82 - 2072

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In Re

ALGER HISS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the prosecution suppressed and withheld relevant material evidence concerning the authenticity of the typewriter, Ex. UUU, which evidence, in the circumstances of this case, was exculpatory.

2. Whether petitioner was deprived of his Sixth Amendment right to counsel as the result of repeated incursions into the defense camp by the prosecution and FBI agents.

3. Whether the prosecution improperly withheld pre-trial statements made by Whittaker Chambers, so as to deprive petitioner of a fair trial.

4. Whether, if the present record does not support the issuance of a writ of error *coram nobis*, petitioner is entitled to an evidentiary hearing on the issue of electronic surveillance of Hiss before and during the trial, and on the other issues raised by the petitioner.

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Alger Hiss respectfully prays that a writ of *certiorari* issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above matter on February 16, 1983, affirming the judgment of the District Court for the Southern District of New York dismissing the petition for a writ of error *coram nobis*.

Opinions Below

The opinion of the District Court (Owens, J), officially reported at 542 F. Supp. 973 (1982), appears in an appendix hereto at p. 1a. The *per curiam* memorandum of the Court of Appeals (Van Graafeiland, PJ, Metzner and Meskill, JJ) is not reported and appears in the appendix at p. 48a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1983. An application for rehearing *en banc* was denied on March 20, 1983. This petition is being filed within ninety days of the date of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes and Rules

The petition relies on the Fifth and Sixth Amendments to the Constitution of the United States.

Statement of the Case

The trial of Alger Hiss was one of the great State Trials in the recent history of the United States. It was born in 1948, midst the tensions of the Cold War and the election campaign between President Harry S. Truman and Gov. Thomas E. Dewey. It was an instant political football. The case was Richard Nixon's springboard to national prominence, the first of his "Six Crises." It had immeasurable political and historical impact on contemporaneous events and continues a bone of contention even to today. This is so not only because of its importance in our history, but because of continuing uncertainty about the correctness of the verdict that Hiss was guilty of perjury in denying, in effect, that he had committed espionage, and uneasiness about how that verdict was obtained.

This petition is based on recent disclosures under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), bearing on the uncertainty about Hiss' guilt and justifying the uneasiness about how it was proven.

The case is still an unhealed wound in the nation's body politic. Only this Court now has the power to cleanse that wound. For the sake of the integrity of the courts and the judicial system and, above all, for the sake of history, we urge this Court to exercise that power.

On August 3, 1948, Whittaker Chambers testified at a hearing of the House Committee on Un-American Activities (HUAC) that Hiss had been a member of an "underground" group of the Communist Party during his government employment from 1934 to 1937 (J.A. 465-467).[1] Hiss was then President of the Carnegie Endowment for International Peace, after having rendered distinguished service in the government (J.A.

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1 References are to the Joint Appendix filed with the Court of Appeals. A copy will be filed with the Clerk of the Court with this petition.

3881-3909).[2] His government service as a New Dealer and his association with the Yalta Conference and the United Nations made him an inviting political target.

Hiss responded to the Chambers charge by requesting an opportunity to appear before the Committee. He did so on August 5, 1948. He denied knowing anybody by the name of Whittaker Chambers; later, confronting Chambers, Hiss identified him as a free-lance journalist he had known casually from about 1934 to 1936 under the name of George Crosley. Hiss denied that he had ever been a member of the Communist Party, and challenged Chambers to repeat his charges outside the privileged area of the House hearings. Chambers did so, and Hiss sued Chambers for libel in the United States District Court in Baltimore.

Up to this point, Chambers had made no claim in his several appearances before the House Committee or in his many interviews with the FBI that any government documents had been given to him by Hiss. As late as October 14 and 15, 1948, he said that he had no knowledge of anyone in the employ of the government furnishing information to the Communist Party (J.A. 3389, 3390).

In the pre-trial proceedings in the libel suit, on November 17, 1948, Chambers produced 65 typewritten pages, copies or summaries of 43 State Department communications, and four notes in Hiss' handwriting relating to State Department business. Chambers said all of these papers had been given to him by Hiss.[3]

The production of these papers resulted in the calling of Chambers before a grand jury in the Southern District of New

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2 Hiss' government employment included law clerk to Mr. Justice Oliver Wendell Holmes, Jr., assistant to Jerome Frank in the Agricultural Adjustment Administration, legal assistant to the Nye Committee of the United States Senate, attorney in the Office of the Solicitor General of the United States, and assistant to Francis Sayre, Assistant Secretary of State. He had been a member of the United States delegation at the Yalta Conference, and had been Secretary General of the San Francisco Conference which created the United Nations.

3 These notes and typed pages will hereinafter be referred to as the Baltimore Documents, the name by which they were referred to at the trials and all subsequent proceedings.

York. Hiss appeared voluntarily before the grand jury to respond to Chambers' charges and testified on several occasions from December 7 to December 15, 1948. On the latter date, an indictment against him was voted.

The indictment was in two counts. The first alleged that Hiss had testified falsely before the grand jury when he stated that he had not turned over to Chambers any restricted documents; the second alleged that he had testified falsely when he said that he thought he could definitely say that he had not seen Chambers after January 1, 1937 (J.A. 4667-4670).

The case came on for trial on May 31, 1949, before the Hon. Samuel H. Kaufman and ended in a mistrial when the jury was unable to agree. A second trial before the Hon. Henry W. Goddard commenced on November 17, 1949, and ended in a verdict of guilty on each count on January 21, 1950. Hiss was sentenced to five years on each count, the sentences to run concurrently. After appeal,[4] Hiss was taken into custody where he remained until November, 1954.

On January 24, 1952, he moved for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. That motion was denied and the denial was affirmed on appeal.[5]

More than two decades later, on various dates between March, 1975 and September, 1976, Hiss made requests of the Department of Justice, the Federal Bureau of Investigation, and other government departments pursuant to FOIA, seeking their files relating to him. Since that time various government agencies have transmitted some files, often severely censored, to Hiss. Upon the failure of the government to make complete response, Hiss, in October 1976, brought an action to compel more expeditious production of the files. Such action (76 Civ. 4672) is still pending before Judge Owen. This present petition is based on evidence in the files produced by the government.

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4 The conviction was affirmed on December 7, 1950, 185 F.2d 822. A petition for a writ of *certiorari* was denied on March 12, 1951, 340 U.S. 958.

5 The motion was denied by Judge Goddard on July 22, 1952, 107 F. Supp. 128. The Court of Appeals affirmed on January 30, 1953, 201 F.2d 372, and a petition for a writ of certiorari was denied on April 27, 1953, 345 U.S. 942.

Still other evidence may turn up as a result of the still pending FOIA action, but that eventuality may be far off.[6]

The Trial Evidence

A brief summary of the evidence at the trial follows. Further details will appear in connection with petitioner's argument.

Whittaker Chambers was the prosecution's principal witness. He testified that he and Hiss were fellow Communists in the mid-1930's and that Hiss purloined State Department documents for delivery to Chambers either in original form or by copies or summaries typed by Mrs. Hiss, which Chambers photographed for transmission to his Communist confederates.

Chambers stated that in April, 1938, he broke with the Communist Party and discontinued his espionage activities. However, he retained some of the documents which had come into his hands between January and April, 1938.

Chambers also testified to frequent social contacts between the Hiss and Chambers families during this period, including several after January 1, 1937.

As to the first count, Chambers was the sole witness who challenged Hiss' grand jury testimony; the same was true of the second count, except for testimony by Mrs. Chambers as to a single meeting. To corroborate Chambers, the government offered the Baltimore Documents, together with testimony by an FBI agent that the Baltimore Documents and certain letters admittedly typed by Mrs. Hiss (the "Hiss Standards") were typed on the same typewriter.

In his defense, Hiss denied any Communist affiliation and denied having given Chambers any State Department or other classified documents. He testified that, while he was counsel to the Nye Committee, Chambers came to see him at his office, introducing himself as George Crosley,[7] a free-lance writer

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6 Motions for summary judgment in that action have been made by both parties and were submitted to the court for decision on November 12, 1981.

7 There was evidence at the trial that Chambers had used many names, including Adams, Kelly, Dwyer, Breen, Whittaker, Cantwell, and Crosley.

doing a series of articles on the munitions investigation. Subsequently, Hiss sublet his apartment to Crosley-Chambers for a few months. Thereafter, Hiss met Chambers occasionally, usually because Chambers was seeking small loans. Both Hiss and his wife denied other contacts with Chambers, except that on one occasion Hiss gave Chambers a ride from Washington to New York.

The defense contended that Hiss had disposed of his typewriter prior to the date of the earliest of the Baltimore Documents.

After the conviction of Hiss and the completion of the appeals, and while Hiss was in custody, a motion for a new trial was made on grounds of newly discovered evidence, in which it was argued, *inter alia*, that the typewriter in evidence and supposed to have been used by Mrs. Hiss to type the Baltimore Documents was in fact not the machine ever owned by the Hiss family.

Petitioner served out his full prison term after his motion for a new trial was denied and appeals concluded.

No one who lived sentiently during the Hiss case will ever forget it. The historian Walter Millis has observed that "the Hiss case occupied our hearts and headlines" for 18 months and, at the end of that period, the climate of the times was such that "Hiss' conviction had doubtless become all but inevitable."[8]

A documentary film recently produced about the Hiss case and soon to be broadcast on public television "explores a particularly dismaying chapter in recent American history."[9] A second television presentation on the Hiss case is slated for public television in another year or so.

Despite the passage of time, the sharp differences of opinion generated by the Hiss prosecution have not abated. In those

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8 Walter Millis, "The Climate of the Hiss Trials," *The Saturday Review*, May 31, 1958, pp. 14, 15.

9 Vincent Canby, "Real Life as the Focal Point," *The New York Times*, March 23, 1980, p. D21, commenting on the documentary film *The Trials of Alger Hiss*.

rare instances of relatively disinterested comment, one finds grave doubts concerning both Hiss' guilt and the fairness of the proceedings against him. For example:

(a) Prof. Charles Alan Wright wrote that close study of the case "convinces me that not only was Hiss not proven guilty, but that in fact he is innocent."[10]

(b) Richard B. Morris, Gouverneur Morris Prof. of History Emeritus at Columbia University, found the prosecution tactics egregiously unfair.[11]

(c) Former Ambassador George F. Kennan is "little inclined" to accept the jury's verdict against Hiss.[12]

(d) In 1976 an "unscientific poll" of about 100 "lawyers, journalists, and various intellectuals" found those who would respond about equally divided on the question of Hiss' guilt or innocence.[13]

To date, at least 13 books have been written on the Hiss case. At least one more book and several manuscripts are in preparation. Other books devote entire chapters to the case. Innumerable articles have appeared in magazines and newspapers. Interest in the case is current, and widespread public discussion of the Hiss trial continues contemporaneously with the filing of this petition for *certiorari*.

This Court has the unusual opportunity to right a historic wrong of tragic political and personal dimensions. There is still time to render a small measure of justice to this petitioner and to history, insofar as that is possible after a lapse of thirty years.

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10 Charles Alan Wright, Book Review, 35 Minn.L.Rev. 228, 229 (1951). Prof. Wright repeated this view a year later in another book review in the *Saturday Review*, May 24, 1952, p. 11, reprinted in *The New York Times*, October 26, 1973, p. 43.

11 Richard B. Morris, *Fair Trial* (N.Y.: Knopf, 1952; Rev. Ed. Harper & Row, 1967); Chap. XIV "The Case of Alger Hiss."

12 George F. Kennan, *Memoirs: 1950-1963* (Vol. II) (Boston: Little, Brown, 1972), p. 195.

13 Philip Nobile, "The State of the Art of Alger Hiss," *Harpers*, April, 1976, pp. 67, *et seq.*

REASONS FOR GRANTING THE WRIT

I. A Writ Of Error *Coram Nobis* Will Lie To Vacate A Conviction Where Such Action Is Necessary To Correct Manifest Injustice.

> There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation. *Stone* v. *United States*, 113 F.2d 70, 77 (6th Cir. 1940).

A petition for a writ of error *coram nobis* is appropriate to correct the manifest injustice arising from the fact that petitioner did not get a fair trial. It is a vehicle whereby the courts can "act in doing justice if the record makes plain a right to relief." *United States* v. *Morgan*, 346 U.S. 502, 505 (1954). Such relief should be granted against a judgment of conviction where there are circumstances compelling such action to achieve justice. Otherwise, "a wrong may stand uncorrected which the available remedy would right." *Id.* at 511, 512.

The courts have granted *coram nobis* writs in a large variety of cases; a list of the circumstances in which the writ is available is as long as the list of the ways in which constitutional rights can be denied by governmental action. Constitutional transgressions appropriate for consideration in *coram nobis* proceedings include the prosecution's failure to turn over *Brady* materials, *United States* v. *Keogh*, 391 F.2d 138 (2d Cir. 1968); selective prosecution, *United States* v. *Danks*, 357 F. Supp. 193 (D. Haw. 1973); the failure to allow the defendant to appear *pro se*, *United States* v. *Plattner*, 330 F.2d 271 (2d Cir. 1964); the knowing use of perjured testimony, *Garrison* v. *United States*, 154 F.2d 106, 107 (5th Cir. 1946); subsequent changes in the law, *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976), *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974); deprivation of counsel, *United States* v. *Morgan, supra*; and the defendant's mental incapacity at the time of sentence, *United States* v. *Valentino*, 201 F. Supp. 219 (E.D.N.Y. 1962).

Petitioner has presented substantial evidence in support of his contention that his trial was unfair. It shows that the prosecution concealed exculpatory evidence in its files and that it utilized the services of informers in the camp of petitioner's

counsel. In support of his petition, Hiss offered some 150 exhibits recently recovered from FBI files.[14]

Petitioner's evidence is sufficient to overcome the presumption that "the proceedings were correct." *United States* v. *Morgan, supra*, 346 U.S. at 512, and "to put on the government the burden of coming forward with proof" that such misconduct did not occur. *United States* v. *Keogh*, 440 F.2d 737, 741 (2d Cir. 1971).

Although petitioner was convicted 30 years ago, he is not precluded from seeking relief at this time. *United States* v. *Morgan, supra*, 346 U.S. at 507; *United States* v. *Cariola*, 323 F.2d 180, 183 (3d Cir. 1963). He commenced proceedings to obtain the relevant evidence as soon as the FOIA permitted, although his burden would not be increased even if he had delayed seeking relief. *United States* v. *Cariola, supra*, 323 F.2d at 183; *United States* v. *Morgan*, 222 F.2d 673, 675 (2d Cir. 1955).

A major portion of the government's case is devoted to the argument that petitioner was guilty, that contention being embellished by a detailed analysis of a few items of so-called "overwhelming proof" of petitioner's guilt. The fact that the first jury disagreed on substantially the same evidence demonstrates that the government's case is not as clear as it now pretends.

We need not concern ourselves excessively with this problem. The court, after remand by this Court in *United States* v. *Morgan, supra*, said:

> To hold that this defendant can be relieved of an unconstitutional conviction only if he makes a showing of innocence (or a showing that he probably would be acquitted at a constitutionally conducted trial) would be to compound the unconstitutionality of his conviction, for it would shift to him the burden of proof, deprive him

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14 Textual and footnote references to "CN 1" through "CN 84" (J.A. 121-438) are to exhibits annexed to the petition submitted to the court on July 26, 1978. References to "CN 85" through "CN 135" (J.A. 1262-1607) are to additional exhibits presented to the court with petitioner's brief. In making reference to the exhibits, we have also included appropriate reference to the Joint Appendix.

> of the presumption of innocence, and leave the determination of his guilt or innocence to a judge, thus denying him a jury trial.

United States v. *Morgan, supra,* 222 F.2d at 674-675.

Hiss has already been punished far beyond any penalty that may have been imposed by the courts. His effort now is not to avoid further punishment but to secure recognition that his trial was not the fair trial guaranteed by the Constitution. Hiss' conduct throughout this litigation has been that of a man sure of his innocence. From the beginning of the controversy he has himself sought out and has often secured the evidence which, ironically enough, has been used to convict him.

So, beginning with his challenge to Chambers to repeat his charges in a non-privileged arena, Hiss has consistently behaved as if full discovery of the truth would vindicate him. He did not have to issue such a challenge, nor to bring a libel suit when Chambers met the challenge. It is inconceivable that Hiss, if guilty, would have instituted the libel suit knowing that if Chambers had retained the Baltimore Documents, Hiss would face serious charges. His insistence on appearing and testifying before the grand jury was consistent only with a consciousness of innocence.

When the Baltimore Documents were produced, Hiss voluntarily produced for the government several documents written on his discarded typewriter. He conducted an extensive search for that typewriter, thought he found it, and put in evidence the machine he found, although, if he were guilty, he would have known that production of the typewriter could only have done him great harm.

Even after his conviction, petitioner has continued his struggle for vindication. He made an elaborate and expensive motion for a new trial at a time when his prision term had been almost half served. He wrote a book to argue his innocence when it might have seemed wiser had he let the matter rest. Now he has brought this proceeding which, if unsuccessful, can only cause him additional pain and suffering.

II. The Government Concealed Evidence That The Typewriter Upon Which It Heavily Relied At The Trial Was Not In Fact The Hiss Typewriter

As soon as Chambers produced the Baltimore Documents, Hiss, his wife, and his lawyers began a search for the Hiss family typewriter from the 1930s, and for documents that might have been typed on it. The documents they located were turned over to the FBI and were put in evidence by the defendant. After an extended search, Mr. McLean discovered a Woodstock typewriter bearing No. 230,099, which the defense thought was the typewriter from the Hiss household. It was introduced into evidence by the defense as Ex. UUU.

The government introduced the Baltimore Documents. Similarly received in evidence without objection were three letters and a report typed by Priscilla Hiss (the "Hiss Standards").

Ramos C. Feehan, an FBI agent, testified that as a result of his examination of the typed Baltimore Documents and the Hiss Standards, he reached the conclusion that they were typed on the same machine (J.A. 3848). There was no cross-examination of Feehan on this conclusion, and Feehan did not testify about the typewriter in evidence, Ex. UUU.

The government also presented a demonstration by John S. McCool, an FBI agent, who, in open court, copied one of the Baltimore Documents on Ex. UUU, and testimony by George Norman Roulhac, who testified as to the whereabouts of the typewriter in 1938.

For the defense, Mrs. Hiss testified that some time between June, 1931 and January, 1933, she had acquired a Woodstock office typewriter which had belonged to her father, Thomas Fansler (J.A. 4384). She used the typewriter for some household correspondence thereafter. When the Hisses moved their home at the end of 1937, she disposed of the typewriter by giving it away.

Both Hiss and his wife denied typing any of the Baltimore Documents, and contended that they did not have possession of the Woodstock after 1937. (The typed Baltimore Documents are all dated 1938.)

Although there was no testimony at the trial that Ex. UUU had produced either the Baltimore Documents or the Hiss

Standards, the government adopted Ex. UUU as one of its exhibits and forcefully asserted its relevance. In closing, the prosecutor, Thomas Murphy, told the jury that the Baltimore Documents "were typed on that machine (indicating). Our man said it was" (J.A. 4575).[15] In fact "our man" had said no such thing.

The court followed in Murphy's footsteps and charged the jury:

> Another exhibit was the Woodstock typewriter that was or had been the property of Mr. and Mrs. Hiss. It is the contention of the government that this is the typewriter upon which Baltimore Exhibits 5-47 (with the exception of Exhibit 10) were typed.

The same line of argument, including the same misstatement as to the state of the record, was offered in the government's brief to the Court of Appeals, p. 21, and in its opposition to the petition for certiorari.

After Hiss' appeals, and after he had served almost a year of his prison term, new counsel for the first time, through a motion for a new trial, raised questions concerning the authenticity of the typewriter which Hiss had himself presented to the court as his own. His argument then was that the typewriter produced at the trial had been specially fabricated to deceive. The government argued, *inter alia*, that the typewriter was

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15 There are other examples of Murphy's argument to the jury linking the Baltimore Documents and Ex. UUU. See, for example, the transcript of closing argument at J.A. 4559:

> Now, Mr. Cross [defendant's attorney] has said, and the Judge will charge you, that there is a presumption of innocence that you have to consider when you get into that juryroom. They say that the presumption of innocence is a cloak for the innocent. That is true. But, ladies and gentlemen, it was not made by Omar, the tentmaker. It just isn't tremendous. It can be filled with holes. Each time (striking the typewriter keys) a hole (striking typewriter keys). The presumption of innocence theory was made for the guilty. Just keep that in your mind when you are in the juryroom and see whether or not the cloak isn't full of holes.

Murphy spent a good deal of time on the typewriter in his summation; see, for example J.A. 4569-4577. In closing his summation, he asked the jury to take into the juryroom with them "those photographs; take the machine, the instruments" (J.A. 4583).

irrelevant because the opinion of Feehan was based solely on a comparison of the Hiss Standards and the Baltimore Documents. Hence, even if the machine had been specially fabricated, "the soundness and the completeness of the government's evidence is not affected one iota" (J.A. 944). Forgotten were McCool's demonstration, Roulhac's testimony, Murphy's closing statement with its heavy emphasis on Ex. UUU, the court's charge at the trial, and the government's argument on appeal, all of which proceeded on the theory that Ex. UUU was in fact the typewriter which had typed the Baltimore Documents—the theory on which the case was submitted to the jury.

In any event, Hiss was unable to prove special fabrication on the motion for a new trial in 1952 (see J.A. 784-89). But the documents obtained 30 years later through the FOIA not only support Hiss' contention that Ex. UUU was not the Hiss machine, but also establish that the prosecution, too, had doubts as to its authenticity.

Evidence in the FBI and Justice Department files, improperly concealed from petitioner, led government investigators to conclude that Ex. UUU could not have been the machine owned by Fansler and given to Mrs. Hiss. When Murphy adopted Ex. UUU as a government exhibit, and argued that it was "immutable evidence" of guilt, he had strong reason to doubt that it was the typewriter owned by Hiss. In asserting the irrelevancy of the typewriter on the motion for a new trial, the government was covering up its failure to disclose to the defense the evidence in its files.

We now know that within 48 hours after Hiss told the FBI that his typewriter had originally been owned by Fansler, FBI Director Hoover instructed the Philadelphia agents of the FBI to seek the typewriter and specimens of typewriting from any machine owned by Fansler (CN 39; J.A. 307). When the government learned that the defense had found what it thought was the Woodstock typewriter formerly owned by the Fansler and Hiss families and that it bore serial number 230,099, there was consternation in the FBI: their evidence was that Fansler had bought his Woodstock before No. 230,099 would even have been manufactured.

The field offices of the FBI were directed to "conduct all possible investigation to determine history this typewriter [Serial No. 230,099] since its manufacture including sale, resale, and repair" (CN 55; J.A. 345). The Philadelphia field office, on whose shoulders the burden of the field investigation had fallen, was quick to advise the Director:

> *It is desired to point out*, in the event this has not previously been considered, *that the definite possibility exists this typewriter is not the one received by Priscilla Hiss from her father Thomas Fansler. The investigation to date has established that the Fansler-Martin partnership purchased a Woodstock typewriter in nineteen twenty-seven. * * * Serial numbers manufactured between twentyfive and thirtyone which makes it apparent that two three naught naught nine nine would have been manufactured in twentynine.* (CN 57, p. 1; J.A. 347 underscoring in document as supplied).

When the FBI got samples of typing from Ex. UUU, Ramos Feehan concluded that they matched both the Baltimore Documents and the Hiss Standards, *i.e.*, that all three sets of documents came from the same machine, necessarily Ex. UUU. This conclusion was consistent with the government's non-testimonial adoption of Ex. UUU in the litigation, but inconsistent with the FBI's field investigation evidence that Ex. UUU bore a number too high to have been the Fansler-Hiss machine and therefore could not have typed the Hiss Standards. Hoover directed agents in the field to continue their investigation, but warned that:

> Under no circumstances during the course of the above-requested investigation should the fact be disclosed that typewriter bearing serial 5N 230,099 has been identified as the machine which was used to type the "Baltimore documents" (CN 58; J.A. 350).

This instruction was followed not only by the FBI, but also by the prosecution at the trial. So it never disclosed that the FBI laboratory had come to the conclusion that Ex. UUU was "the machine which was used to type the 'Baltimore Documents' . . . " (CN 58; J.A. 350).

The government admitted in its answer to the petition herein that:

> from the very moment defendant produced the typewriter which later became Ex. UUU, the prosecution was aware of the possibility that it was not the machine which had passed from the Fansler/Martin partnership into the hands of Hiss.

(Gov't. Response, ¶ 76, admitting the allegations of ¶ 113 of the petition. J.A. 450, 25.)

Only now do we know that the government embracement of the defense exhibit (see pp. 11-13 above) was undertaken despite prosecution knowledge, not shared by the defense, that it was probably not what it was purported to be, and that there was a deliberate prosecution strategy undertaken to hide relevant information and shield the government's fragile case from being undone.[16]

To claim, as does the government, that the identity of the typewriter was irrelevant is sheer sophistry. Had all of the facts been known to the defense at the time of the trial, endless opportunities for cross-examination of the government witnesses would have been available and the expertise of the government experts could have been successfully challenged.

When the prosecution presents false evidence it knows to be false, or conceals exculpatory evidence, reversal is called for and that result cannot be avoided by terming the evidence irrelevant. The conduct of the prosecution here was even worse. Knowingly false statements were made over and over again by the prosecutor in his summation and by implication in his presentation of the testimony of McCool and Roulhac. In 1952 the defendant believed that the prosecutor had been in error in his closing when he attributed the typed Baltimore Documents and the Hiss Standards to Ex. UUU. What Hiss

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16 The government claims that petitioner here seeks to relitigate the motion for a new trial. This contention is not well taken. Petitioner's claim here focuses on governmental misconduct, unknown to the defense at the time of the motion for a new trial, in keeping relevant information from the defense, the court and the jury, thus turning the trial into a sham and depriving petitioner of a fair trial.

did not know was that the prosecution, before and throughout the trials, had substantial evidence that this attribution was wrong.

The prosecutor's interest in winning a conviction—virtually a political necessity in the highly charged atmosphere of the times—outweighed his interest in presenting the full truth. By withholding material information from the jury, the prosecutor usurped its role, and he himself became the "fact" finder, a clear violation of law of constitutional dimensions. As the court noted in *Imbler* v. *Craven*, 298 F. Supp. 795, 806 (C.D. Cal. 1969), *aff'd. sub nom., Imbler* v. *State of California*, 424 F.2d 631 (9th Cir.), *cert. denied*, 400 U.S. 865 (1970), "[i]t is not only affirmative misrepresentations which the prosecutor is prohibited from employing to secure a conviction; omissions and half-truths are equally damaging and prohibited, and their use is no less culpable."

See *Ashley* v. *State of Texas*, 319 F.2d 80 (5th Cir. 1963) (in a prosecution for murder, a prosecution expert pronounced the defendant insane, but this information was not disclosed. The court held that the prosecution's suppression of such evidence was sufficient to justify relief on a *habeas corpus* petition).

See also *Turner* v. *Ward*, 321 F.2d 918 (10th Cir. 1963); *Barbee* v. *Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964); and *United States* v. *McGovern*, 499 F.2d 1140, 1143 (1st Cir. 1974).

III. The Justice Department And The FBI Made Repeated Incursions Into The Defense Camp Thus Depriving Petitioner Of A Fair Trial And His Sixth Amendment Rights To Counsel.

In October, 1948, Horace Schmahl was retained by Hiss' attorney Edward C. McLean as a private investigator. On November 1st, Schmahl reported to McLean that a credit report on Mrs. Chambers was in the possession of the Baltimore Credit Bureau relating to a possible fraudulent application by Mrs. Chambers for credit (CN 4-A; J.A. 131). Evidently Schmahl did not furnish McLean with a copy of the report, but, on December 15 or 16 (the day after the indict-

ment), Schmahl furnished the FBI with a copy (CN 4-B; J.A. 136; CN 5; J.A. 131).

The government utilized Schmahl as a valuable source of further material up to and including the trial. Agent Hottel, in a telex on December 22, 1948, suggested that the "Bureau and New York office consider advisability of immediate interview with Schmahl" (CN 6; J.A. 141). Hoover directed that the New York office ascertain if Schmahl was looking for the typewriter (CN 6; J.A. 143). Assistant U.S. Attorney Donegan requested that the proposed interview with Schmahl be held in abeyance "at this particular time" because such interviews would have to be arranged through McLean and because ". . . Schmahl had previously stated that he would keep the Bureau advised of any pertinent developments that he might uncover" (CN 8; J.A. 144).

On March 22, 1949, Schmahl called the FBI to report that McLean had asked him to take over an additional assignment; Agent Shannon advised him that ". . . if he had any further information he was at liberty to drop into this office in the U.S. Courthouse and make this information available to us" (CN 4-C; J.A. 138).

An FBI intra-office memorandum signed by Corcoran dated June 1, 1949, after the opening of the first trial, reports that "Schmahl has had telephonic contacts with Special Agents James P. Lee and D. V. Shannon of this office in reference to the Hiss-Chambers case." The memorandum warned that a contact with Schmahl at this time could be later construed adversely since the Hiss case was on trial (CN 9; J.A. 147).

Murphy had no such inhibitions and even Corcoran's doubts as to the propriety of interviews with Schmahl were rapidly overcome. On June 5, Schmahl advised Murphy of the efforts of Hiss' lawyers to secure another old Woodstock typewriter (CN 10; J.A. 148). Murphy ascertained that such a typewriter had in fact been acquired (CN 10; J.A. 148, 149), and cross-examined Hiss and Mrs. Hiss in the second trial concerning this incident (J.A. 4199-4201; 4466-4467). He also referred to the matter in closing argument (J.A. 4575). There were further contacts between Schmahl and Murphy during the late afternoon of June 6 "to give information concerning the Hiss case

. . . an additional interview is anticipated in the immediate future" (CN 12; J.A. 151). On June 14, Corcoran stated that Schmahl "is scheduled for further interview concerning the Hiss case" (CN 12, p. 4; J.A. 152).

A memorandum signed by Agent Spencer dated September 22, 1949, advises that Schmahl "confidentially through Armand Chankalian, administrative assistant to the United States Attorney, SDNY, turned over the result of his investigations" for the Hiss lawyers (CN 14; J.A. 159).

While the motion for a new trial was in preparation Agent Scheidt advised Hoover that Schmahl, who, he said "had furnished info *on a confidential basis* to this office regarding the Hiss case," had advised the FBI that he had been interviewed by Hiss' lawyers with respect to the motion for a new trial. Schmahl stated that he had a further appointment with the Hiss lawyers and "would advise this office of the results of this interview" (CN 15; J.A. 160; underscoring in document as furnished).

The government's contact with members of the Hiss investigatory staff did not end with the trial. While the motion for a new trial was in preparation, Raymond Schindler, who had been retained to conduct confidential investigatory work for Hiss' new attorney, Chester Lane, reported to the FBI, advising it of the names of the typewriter experts who had been consulted by Lane. Agent Belmont advised Schindler

> that we appreciated his calling and the furnishing of this information to us. . . . He was advised that if he had additional information, he might desire to contact Mr. Scheidt in New York at his convenience. He stated that . . . he would get in touch with him at such time as the results of examination by Seller were known to him (CN 17; J.A. 169).

Later in the year, Hiss retained Robert C. Goldblatt, a professional document examiner, who produced several reports for the Hiss staff. This time the FBI did not wait for Goldblatt to report to it; instead, Agent McQueen took the initiative by visiting Goldblatt. He received the results of Goldblatt's investigations which had asked for "on a confidential basis." A full

report together with correspondence to Hiss' staff was filed with the FBI (CN 19; J.A. 174).[17]

The government did not deny any of these activities. It argued:

(a) That Schmahl's contacts with the government were known to Hiss' attorneys and encouraged by them. But every incident the government cites of so-called "cooperation" with the FBI by Hiss' lawyers occurred before Hiss was indicted. See CN 86; J.A. 1271.

No such argument is, or could be, made with respect to Schindler and Goldblatt.

(b) That the FBI rebuffed all offers of information. The government does not make a similar argument as to the Department of Justice. Murphy and Chankalian had continuing contact with Schmahl throughout the first trial and did not "rebuff" but rather encouraged him. Special Agent Shannon invited Schmahl to come in any time he had information which might be useful (CN 4-C; J.A. 138), and Shannon and Special Agent Lee both had contacts with Schmahl as late as May, 1949 (CN 9; J.A. 146). Contacts with Schindler and Goldblatt were as late as 1952.

In this case, unlike *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), information was passed to the government and there is good reason for a *per se* rule of reversal. *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978). Actually a *per se* rule of reversal is hardly necessary in this case. If the showing made by petitioner is not sufficient to establish prejudice, it is difficult to see how prejudice can be established without extensive hearings of the kind held in the *Klein* v. *Smith*, 559 F.2d 200 (2d Cir. 1977) *cert. denied*, 434 U.S. 987 (1977). A defendant often does not know of leaks from his counsel to the prosecution until after the trial and at that point it is often impossible for him to prove actual prejudice, especially if the burden of proof is to be placed on him. *Cf. Holloway* v. *Arkansas, supra,* 435 U.S. at 488-491. Indeed:

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17 Some of the pages of that exhibit are barely legible on the copies supplied to Hiss by the FBI, and have been retyped for the convenience of the court (see, J.A. 424-430).

> [I]t is highly unlikely that a court can . . . arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pre-trial discussion with potential witnesses, in the selection of jurors, or in the dynamics of the trial itself.

United States v. *Levy, supra*, at 208. The probability of unfairness due to these intrusions is quite incapable of realistic delineation. *Accord, United States* v. *Ripso*, 460 F.2d 965, 976-77 (3d Cir. 1972).

At the very least, the government should bear the burden of proving that its intrusions into the defense camp did not prejudice the trial. See *United States* v. *Rosner, supra*, 485 F.2d at 1224; *United States ex rel Chambers* v. *Maroney*, 408 F.2d 1186, 1190 (3d Cir. 1969), *aff'd. on other grounds*, 399 U.S. 42 (1970).

IV. The Prosecution Improperly Withheld Pre-Trial Statements Made By Whittaker Chambers.

The trial judge presiding at the second trial wrote, "[i]t is apparent that the outcome of this trial is dependent to a great extent upon the testimony of one man—Whittaker Chambers. Mr. Chambers' credibility is one of the major issues upon which the jury must pass." *United States* v. *Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950).[18] By withholding statements by Chambers that contradicted his trial testimony, and exculpated the petitioner, the prosecution deprived Hiss of a fair trial.

Three statements of Chambers were withheld from the trial courts and the defendant:

(a) A 184-page statement written in the first person, and compiled from stenographic notes of the interviews of Chambers by FBI agents conducted between January 3 and April 18, 1949 (CN 21; J.A. 192). The prosecutors instructed the FBI not to permit Chambers to sign the statement, because as Donegan said:

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18 See also the prosecution's opening at the first trial (J.A. 3248).

> . . . if he did sign it, this fact might be brought out during the course of the trial, and . . . there was possibility that the Judge might allow the defense attorneys to read the statement, which would probably result in some complication. . . . (CN 20-A; J.A. 187)

(b) A 5-page recording of Chambers' statement by FBI agents on March 26, 1946 (CN 22; J.A. 253).

(c) An 8-page holographic statement given February 15, 1949 describing Chambers' homosexual practices in the mid-1930s. (CN 23; J.A. 258. See J.A. 430-31 for a transcription of this statement.)

The district court held (1) that no request was made for the statements and (2) that they were not required to be produced in any event.

1. The alleged failure of the defense attorneys to demand production of these statements must be considered in the light of the proceedings in both the first and second trials. Prior to the first trial, the defense moved for all statements, "whether signed or not made at any time by Whittaker Chambers . . . concerning any matter relevant to the issues in this action" (CN 20; J.A. 185-86). The relief sought was denied, with leave granted to renew at trial. *Id.*

At the first trial, Chambers admitted signing only three statements, all in December, 1948, which were produced to the trial court for review (J.A. 185). He also stated that there were unsigned statements in 1943 and 1945. No mention was made of the 1946 or the two 1949 statements (J.A. 186-61).

Defense attorney Stryker requested production of all the statements he knew about:

> MR. STRYKER: Now, if your Honor please, under the Krulewich [sic] case and various similar adjudication . . . , and the memorandum which your Honor has, . . . I now ask your Honor for a direction that there be turned over to me at this time each and all the questioning to which this witness has referred. Summarizing them as best I can, there was the testimony before the grand jury in October, 1948. There were two questionings by Mr.

> Murphy, the security officer of the Department of State— . . . and these two, I think we have three questionings by the F.B.I. Under the cases which are so familiar to your Honor that I shall not trespass on your time to do more than mention them, I respectfully ask for an order to that effect. (J.A. 1861-62)

Murphy produced unsigned FBI reports dated May 14, 1942 (not 1943, as Chambers testified), and June 26, 1945. The court below concluded from his colloquy (at J.A. 1861-62) that Stryker had not requested the 1946 and 1949 statements, the existence of which he was unaware (J.A. 4702). Murphy did not consider himself limited to production of only the precise reports mentioned by the witness; he produced a 1942 statement and the three December, 1948 statements as well. See J.A. 2493, *et seq.* But he withheld the statements in 1946 and 1949.

Moreover, the prosecution categorically denied the existence of other statements during an in-chambers conference in the first trial. When the court asked whether Chambers made any statements to the FBI *prior* to December, 1948, the prosecutors answered more broadly:

> MR. MURPHY: My recollection is, Your Honor, that he gave three after these two [recorded in FBI reports dated May 14, 1942 and June 26, 1945] you just read which are not written statements, but in 1948, commencing in December, he gave three written statements to the FBI, and *those were the only written statements he gave. Is that correct*?
>
> MR. DONEGAN: *This is correct.* (J.A. 2500, emphasis supplied.)

The court and the defense counsel both understood that they had been given all of Chambers' prior statements. As the court stated when it disclosed portions of the statements to the jury at the first trial:

> THE COURT: Ladies and gentlemen of the jury, during the course of the examination of Mr. Chambers inquiry was made of him as to prior statements that he had made as to his activities. . . .

> The government has given to me five statements, two reports, and three signed statements.
>
> The two reports are one dated May 14, 1942, and the other dated June 26, 1945 . . . (J.A. 2551).

Again the 1946 and two 1949 statements were omitted; the court, like the defendant, was unaware of their existence.

In the second trial defense counsel also asked for *any* recordings of Chambers' statements:

> Now, Mr. Murphy, I would like any statements of the FBI about their talks with Mr. Chambers . . . (J.A. 3400).

Murphy stated there were "no statements made by the witness." Defense counsel was aware of the 1942 and 1945 statements and pointed out their existence (J.A. 3402, 2549). Those documents were produced but, again, the prosecutor failed to reveal the existence of the 1946 and 1949 statements.

Contrary to the views expressed by the court below (J.A. 4702), the defense did not limit its request by date—it would have made no sense for the defense to have refrained from seeking the 1949 statements if Hiss' counsel had known they existed.

2. The court below also sought to excuse the prosecution's failure to disclose two of the withheld statements because they were not signed. The government has not pressed this argument and it has no merit. See *United States* v. *Ragen*, 180 F.2d 321, 326-27 (7th Cir. 1950), *aff'd. sub nom. United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

Even if the Chambers' statements had not been requested, the prosecution had an obligation to reveal their existence. Long before this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), courts both before and after the Hiss prosecution had held that the prosecutor is under an obligation not to suppress evidence favorable to the accused as a matter of due process. *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942); *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Jones* v. *Commonwealth of Kentucky*, 97 F.2d 335, 338 (6th Cir. 1938); see *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

The district court and the government assert that the prosecution's concealment of the statements was not prejudicial.

The decision to suppress the documents, made by the prosecutors familiar with the intimate details of the available evidence, is a potent indication of the likelihood of prejudice to petitioner. *Cf. Alderman* v. *United States*, 394 U.S. 165 (1969).[19] Both the 184-page statement and the statements recorded in the 1946 report were the product of thoughtful consideration by Chambers. Chambers proof-read, edited, and corrected the long statement over several months. The 1946 FBI report records intensive questioning of Chambers which followed a full review with him of information provided previously.[20] Thus, Chambers and the prosecution could not dismiss the inconsistencies in these statements as having been made without thought.

In the circumstances of this case, suppressed evidence must be evaluated carefully and with due consideration to its possible impact upon the jury. See *Giglio* v. *United States*, 405 U.S. 150, 154-55 (1972); *Perkins* v. *LeFevre*, 642 F.2d 37, 40 (2d Cir. 1981); *Dubose* v. *LeFevre*, 619 F.2d 629 (2d Cir. 1980).

In *United States* v. *Agurs*, 427 U.S. 97 (1976), this Court considered situations "characterized by a pre-trial request for specific evidence" with which the prosecution did not comply. *Id.* at 104. In such a case the standard to be employed by the court in determining whether the conviction should stand is whether "the suppressed evidence *might* have affected the outcome of the trial." *Id.* at 104 (emphasis supplied). That is the standard applicable here.

Production of the Chambers statements would have given the defense ample opportunity to challenge central elements of Chambers' testimony. For example, the prosecution seized upon a supposed $400 loan made to Chambers by Hiss in

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19 When there had been deliberate calculated suppression, "prophylactic considerations designed to deter future prosecutorial misconduct . . . " are properly before the court. *United States* v. *Morell*, 524 F.2d 550 (2d Cir. 1975); *United States* v. *Pfingst*, 490 F.2d 262, 277 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); see, *United States* v. *Keogh*, 391 F.2d 138, 146-47 (2d Cir. 1968).

20 Chambers was asked repeatedly for information concerning the Communist affiliation of Hiss, and, after thought, was unable to provide any particulars (CN 21; J.A. 255-58).

November, 1937 because bank records showed a withdrawal of that amount from Hiss' account (Petition, ¶¶ 41-42; J.A. 45-46). At the second trial, the prosecutor emphasized the exact amount of the supposed loan on direct:

> Q. Now you say that Mr. Hiss loaned you $400 on or about the time you bought this automobile in Randallstown. A. That is right.
>
> * * *
>
> Q. And your testimony was then [at the first trial] and is now that Mr. Hiss loaned you $400? A. That is correct.
>
> Q. Not 401 or 399, but $400? A. $400.
>
> Q. In cash? A. That is right.

The 184-page statement, CN 21, presents a different picture. Chambers twice referred in that statement to a loan of $500. (J.A. 245, 247). Further, Chambers said that he remembered the loan as occurring in January or February of 1938, and that he had to be told by FBI agents that the car was purchased in November, 1937. Hiss denied ever having made such a loan.

The discrepancy is not a trivial matter. The asserted coincidence of the supposed loan to Chambers and the corresponding withdrawal of the *same amount* from Hiss' bank account was a major element of the prosecution's case. The "$400" loan was repeatedly mentioned in summation (J.A. 4553-54, 4562-63, 4568). The government argues that the coincidence of the loan and the withdrawal was "literally overwhelming prove of Hiss' guilt" (Gov't. Memo. at 66). The coincidence disappears if the amount and date of the alleged loan and the amount and date of the withdrawal turn out to be different.

Concealment of the 1946 and 1949 statements also facilitated the prosecution's ability to support Chambers' explanation of why he never mentioned petitioner's asserted espionage activities to government officials before November, 1948, and in fact expressly denied that there had been any espionage. Chambers' explanation was that he wanted to "destroy or paralyze the Communist conspiracy within the country and the Government" without "disclosing the ultimate perfidy by which I

mean espionage, [by] merely disclosing the fact that these people were Communists" (J.A. 3347-48).

But in his concealed 1946 statement, Chambers did not tell the FBI that Hiss was a Communist; he went out of his way to *clear* Hiss of Communist affiliation. Chambers easily could have said, as he said in his long 1949 statement, that he collected the Hisses' Communist Party dues (CN 21; J.A. 198), without "disclosing the ultimate perfidy". Instead, Chambers in his concealed 1946 statement retracted his earlier accusations of Hiss' Party membership. It is no wonder that the prosecution concealed these statements.

The concealment of Chambers' holographic statement was even less excusable, as there could be no claim that it was not a signed statement. In it, Chambers said that for three or four years, beginning in 1933 and 1934, he had been a practicing homosexual. This homosexual episode coincided in time with his relationship with Hiss.

During the trial, defendant called Dr. Binger, a psychiatrist, and Dr. Murray, a psychologist, as expert witnesses. Both testified that Chambers was suffering from "a condition known as psychopathic personality," the symptoms of which included, *inter alia*, stealing, persistent lying, acts of deception and misrepresentation, alcoholism, drug addiction, and abnormal sexuality. On cross-examination, Murphy asked each witness whether it was not possible to eliminate, in the case of Chambers, the elements of drug addiction, alcoholism, and sexual abnormality. Dr. Binger answered in the affirmative. Dr. Murray answered, "We have ruled out drug addiction and alcoholism." On the basis of some of the writings of Chambers, he suspected abnormal sexuality, but he didn't have any evidence of such condition.[21] Murphy discussed the psychiatric testimony near the opening of his summation, pointing out that testimony as to the condition of a man's mind "is of a great help" (J.A. 4539). But here, he said, there were no symptoms, no suspicion, no factual basis for a judgment (J.A. 4540).

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21 See Transcript of Record, pp. 2550, 2619, 2812, 2814-15, 2881, annexed hereto as Appendix B.

Never once did Murphy reveal that he had in his files evidence of the "abnormal sexuality" about which he was examining the defense witnesses.

The District Court agreed that the examination of Dr. Murray was improper, but excused it on the ground that it did not affect the verdict (J.A. 4711).

V. Petioner Is Entitled To An Evidentiary Hearing If The Court Does Not Grant The Petition On The Papers Before It.

The allegations in the instant petition go to the heart of the Hiss proceedings, and, if true, create strong doubt as to the fairness of his trial. If the petition on its face does not require that the verdict be set aside, petitioner has certainly met the "rather low" threshold showing necessary to entitle him to an evidentiary hearing, and such a hearing should be ordered. *United States* v. *Keogh,* 391 F.2d 138, 142 (2d Cir. 1968).

The general rule regarding hearings on *coram nobis* petitions is that "[o]nly where the files and records show conclusively that a petitioner is entitled to no relief can a hearing be denied." *Waller* v. *United States,* 432 F.2d 560, 561 (5th Cir. 1970); *United States* v. *Liska,* 409 F. Supp. 1405, 1406 (E.D. Wisc. 1976).[22]

In *Lujan* v. *United States,* 424 F.2d 1053, 1055 (5th Cir. 1970), *cert. denied after remand,* 400 U.S. 997 (1971), the Court of Appeals warned that although evidentiary hearings in *coram nobis* proceedings, as in other post-conviction motions, are not to be automatically granted,

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22 Further guidance on this issue can be obtained by referring to proceedings brought pursuant to 28 U.S.C. § 2255. The same standards are used in determining the necessity of a hearing in both *coram nobis* and § 2255 proceedings. *Owensby* v. *United States,* 353 F.2d 412, 417 (10th Cir.), *cert. denied,* 383 U.S. 962 (1965). 28 U.S.C. § 2255 requires a prompt hearing unless the record conclusively shows no relief is warranted. See, *e.g., Sanders* v. *United States,* 373 U.S. 1, 20-23 (1963); *Fontaine* v. *United States,* 411 U.S. 213, 215 (1973); *United States* v. *Miranda,* 437 F.2d 1255, 1257 (2d Cir. 1971), *cert. denied,* 409 U.S. 874 (1972); *Kyle* v. *United States,* 297 F.2d 507, 511 (2d Cir. 1961), *cert. denied after remand,* 377 U.S. 909; *United States* v. *Rudin,* 212 F.2d 641, 644 (3d Cir. 1954).

> [h]earings to consider attacks on the constitutionality of a criminal conviction are not to be nonchalantly denied. On the contrary, courts have a solemn duty to ferret the allegations for symptoms of constitutional infirmities. The petition and documents before us convice us that Lujan's claims are neither fatuous nor groundless. It is only where the files and records show that a petitioner is entitled to no relief that a hearing can be denied.

The grounds for an evidentiary hearing are far greater here than they were in either *Keogh* or *Lujan*.

In addition to the points discussed above, an evidentiary hearing is urgently required because the record suggests strongly that Hiss was subjected to illegal, warrantless electronic surveillance up to and perhaps during the trial. The documents produced pursuant to the FOIA requests disclose that on November 28, 1945, Hoover made application to the Attorney General for authorization of a wiretap on Hiss (CN 104, 105; J.A. 1458-61). No warrant was then or later secured. The purported purpose of the surveillance was to gather information regarding Hiss' alleged contacts with Soviet espionage agents and Communists in government service.

A wiretap was placed on the Hiss telephone at his residence on P Street in Washington, on December 13, 1945. The logs of the surveillance are about 700 pages in length. The wiretap was continued until the very day Hiss and his family moved to New York City. The documents released from the New York field office are silent as to whether this surveillance, which, according to the FBI, was furnishing valuable information unobtainable "from other sources [or] by other means" (CN 109; J.A. 1483), was continued in New York City. Whether the records were purposely destroyed, and when, is not known. In *United States* v. *Coplon,* 185 F.2d 629, 637 (2d Cir. 1950), the court found that the New York field office of the FBI, at the very time Hiss was indicted and tried, destroyed wiretap documents as a matter of course and in anticipation of litigation. It is most unlikely that the FBI would have ceased its surveillance soley because Hiss moved to New York. The grand jury investigation, the basis upon which the Assistant Director

recommended continuance of the tap in August, 1947 (CN 109; J.A. 1484), continued after Hiss' move to New York, and, indeed, intensified.

Discovery proceedings in *Alger Hiss and William Reuben* v. *Department of Justice, et al.*, 76 Civ. 4672 (RO), referred to above at p. 4, have confirmed that the wiretap files of the New York FBI office have been destroyed but the documents produced pursuant to the FOIA demands have been subject to so much censorship that they provide no information as to the circumstances of their destruction. In that case, petitioner has been seeking court review of those deletions but has been unsuccessful to date; a motion addressed to this matter has been pending before Judge Owen for 19 months.

That inquiry could be pursued by an evidentiary hearing on this *coram nobis* proceeding. There are, in addition, many persons who played a prominent part in the Hiss trial who still available for questioning.

CONCLUSION

The government, as well as the district court, argued extensively that Hiss was guilty, referring to many aspects of the case which are not addressed in Hiss' petition. This extended recital of the evidence against Hiss was repeated in the government's brief to the Court of Appeals.

We have made no effort to meet these arguments. A claim that a defendant did not receive a fair trial cannot be answered by arguing that it doesn't make any difference because he was guilty anyhow:

> This Court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained.

Frankfurter, J., dissenting in *Irvine* v. *California,* 347 U.S. 128, 148 (1954).

It is not possible to re-litigate the entire matter at this time and the only way petitioner can secure a measure of vindication is through this proceeding. This may be the last opportunity for judicial consideration of the petitioner's claim that his conviction resulted from an over-enthusiastic and less than candid prosecution, spurred on by the political demands of the time.

For the reasons set forth above, petitioner believes that his trial was unfair and that his conviction resulted from widespread violation of his constitutional rights. He prays that a writ of *certiorari* issue to review the validity of his trial and conviction.

Dated: New York, New York
June 17, 1983

Respectfully submitted,

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APPENDIX A

Opinion of the District Court

In re ALGER HISS, *Petitioner.*

No. 78 Civ. 3433

United States District Court,
S. D. New York.

July 15, 1982

OPINION

OWEN, *District Judge.*

In the year 1950, petitioner Alger Hiss, after a two-month jury trial in this Court, was convicted of two counts of perjury on an indictment by a grand jury containing the following charges:

COUNT I

* * *

4. That at the time and place aforesaid, the defendant Alger Hiss, duly appearing as a witness before the said Grand Jurors, and then and there being under oath as aforesaid, and having been duly advised of the nature of the investigation then and there being conducted, testified falsely before said Grand Jurors with respect to the aforesaid material matter as follows:

Q. Mr. Hiss, you have probably been asked this question before, but I'd like to ask the question again. At any time did you, or Mrs. Hiss in your presence, turn any documents of the State Department or of any other

Government organization, or copies of any documents of the State Department or any other Government organization, over to Whittaker Chambers?

A. Never. Excepting, I assume, the title certificate to the Ford.

Q. In order to clarify it, would that be the only exception?

Q. The only exception.

JUROR: To nobody else did you turn over any documents, to any other person?

THE WITNESS: And to no other unauthorized person. I certainly could have to other officials.

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant, being then and there employed in the Department of State, in or about the months of February and March, 1938, furnished, delivered and transmitted to one Jay David Whittaker Chambers, who was not then and there a person authorized to receive the same, copies of numerous secret, confidential and restricted documents, writings, notes and other papers the originals of which had theretofore been removed and abstracted from the possession and custody of the Department of State, in violation of Title 18, United States Code, Section 1621.

COUNT II

* * *

2. That at the time and place aforesaid the defendant Alger Hiss, duly appearing as a witness before said Grand Jurors, and then and there being under oath as aforesaid, and having been duly advised of the nature of the investigation then and there being conducted, testified falsely before said Grand Jurors with respect to the aforesaid material matter as follows:

Q. Now, Mr. Hiss, Mr. Chambers says that he obtained typewritten copies of official State documents from you.

A. I know he has.

Q. Did you ever see Mr. Chambers after you entered into the State Department?

A. I do not believe I did. I cannot swear that I did not see him some time, say, in the fall of '36. And I entered the State Department September 1, 1936.

Q. Now, you say possibly in the fall of '36?

A. That would be possible.

Q. Can you say definitely with reference to the winter of '36; I mean, say, December, '36?

A. Yes, I think I can say definitely I did not see him.

Q. Can you say definitely that you did not see him after January 1, 1937?

A. Yes, I think I can definitely say that.

MR. WHEARTY: Understanding, of course, exclusive of House hearings and exclusive of the Grand Jury.

THE WITNESS: Oh, yes.

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant did in fact see and converse with the said Mr. Chambers in or about the months of February and March, 1938, in violation of Title 18, United States Code, Section 1621.

Hiss's conviction was affirmed on appeal, *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948, 71 S.Ct. 532, 95 L.Ed. 683 (1951), and he served three years of the five-year sentence imposed. In recent years, utilizing the Freedom of Information Act, 5 U.S.C. § 552, enacted in 1976, Hiss has obtained many thousands of documents from government files. On the basis of approximately one hundred and fifty of these, he now moves for a new trial by writ of error *coram nobis* asserting various claims of prosecutorial misconduct which allegedly denied him a fair trial.

These claims are: 1) a deprivation of the effective assistance of counsel guaranteed by the Sixth Amendment by reason of improper contacts between the prosecutor and an investigator for Hiss; 2) the suppression by the prosecution of three

statements by Whittaker Chambers; 3) the suppression of material information about the Woodstock typewriter Hiss offered in evidence on the trial; 4) the knowing use by the prosecution of perjured testimony by two government witnesses; and 5) an improper argument by the prosecutor to the jury in summation.[1] To support claim 1) above, the law requires not only a) an improper contact but also b) the communication of some valuable information giving rise to c) some realistic possibility of prejudice to Hiss. *See* p. 988, *infra*. As to the remainder of the claims the law requires factual support for each claim and a showing that but for the alleged misconduct, Hiss on the trial would probably have raised a reasonable doubt as to his guilt. *See* pp. 986-987, 994, *infra*.

A consideration of the extensive history culminating in this case is essential to a proper evaluation of Hiss's present claims, particularly since the jury had this history before it as well.

THE HISTORY

Whittaker Chambers, while an undergraduate in college in 1924, became a member of the Communist Party. His activities over the years culminated in his becoming involved in espionage for the Soviet Union in the 1930's. This espionage work was conducted by means of an underground "cell" in Washington, D.C., the members of which included certain well-placed United States government officials. At some point, however, disillusionment set in, and in April 1938, Chambers broke with the Party, severed all ties, and went to work using his skills as a writer and publisher, to become by 1948, a senior editor of *Time* magazine.

Starting in 1939 and continuing into 1946, Chambers, concerned with what he perceived to be the continuing threat of Communism, spoke guardedly to various officials in the United States government about Communist infiltration into

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1 A claim of unlawful electronic surveillance of Hiss was originally asserted, but on the argument it was conceded by Hiss's counsel that there was no evidence to support the claim.

the government. Among those to whom he spoke were Assistant Secretary of State Adolph A. Berle, State Department security officer Raymond Murphy, and various FBI agents. In the course of these conversations Chambers stated that Alger Hiss was a Communist. By 1946, the fact that these charges were circulating had come to Hiss's attention, as acknowledged by Hiss himself in his testimony two years later before the House of Representatives' Special Subcommittee of the Committee on Un-American Activities (the "Subcommittee" or "HUAC"):

> [CONGRESSMAN RICHARD M.] NIXON. You testified when you were before the committee before that in 1946, Mr. Byrnes had asked you to talk to him concerning certain allegations made by Members of Congress concerning Communist affiliations, and at that time you saw Mr. Tamm of the FBI.
>
> Mr. HISS. I think I talked to Mr. Tamm on the telephone to get the appointment, and I rather think it was Mr. Ladd rather than Mr. Tamm whom I actually saw. . . . I told him that in the interval between my telephone call and the day when they were able to see me, which was at least 1 day later, I had been thinking of any possible basis for any such charge. I was trying to think of all the associations or the organizations that I might possibly have been connected with.

Hiss also acknowledged that the name "Whittaker Chambers" had come to his attention in 1947. First, Hiss later testified that in that year, 1947, two FBI agents had seen him "and among the list of names of people they asked me if I was acquainted with was the name Whittaker Chambers. . . . The name stuck in my memory at the moment because it sounded like a distinctive and unusual name, and I said 'No.' " Second, as Hiss also later testified, it was reported to him by a friend in January or February of 1948 that "a man named Chambers on *Time* had called me, or was reported by hearsay to have said[,] I was a Communist." The friend also reported to Hiss that

upon checking, he was informed that "Chambers on *Time* . . . was not saying anything of the kind at that time."[2]

It was not, however, until some four or five months later, on August 3, 1948, that Chambers, in testimony before the Subcommittee, first publicly named Alger Hiss as a Communist, confining his remarks to statements that Hiss was a member of

> an underground organization of the United States Communist Party . . . . The purpose of this group at that time was not primarily espionage. Its original purpose was the Communist infiltration of the American Government. But espionage was certainly one of its objectives.

These public charges received instant and widespread notoriety, and Hiss—at that time President of the Carnegie Foundation for Peace, a graduate of the Harvard Law School, former law clerk to United States Supreme Court Justice Oliver Wendell Holmes, former advisor to President Franklin Roosevelt, and former Secretary General of the San Francisco United Nations Conference—requested and received the right to appear before the Subcommittee to dispute the charges. He did appear on August 5, 1948, denied any Communist Party affiliation whatsoever, denied knowing Whittaker Chambers,[3] and could not recognize a recent photograph of him.[4] Hiss stated:

> I would much rather see the individual. I have looked at all the pictures I was able to get hold of in, I think it was, yesterday's paper which had the pictures. If this is a picture of Mr. Chambers, he is not particularly unusual

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2 It is at the least puzzling that Hiss apparently did nothing to follow up on this at this time.

3 He acknowledged hearing the name from the FBI, but otherwise said "[t]he name means absolutely nothing to me . . . ." At the next session before the Subcommittee, Hiss also denied knowing Chambers under the name "Carl" which is how Chambers had testified he was known to Hiss.

4 Chambers was apparently heavier in the recent photograph than at the time Hiss had known him.

looking. He looks like a lot of people. I might even mistake him for the chairman of this committee. [Laughter.]

[CONGRESSMAN KARL E.] MUNDT. I hope you are wrong in that.

Mr. HISS. I didn't mean to be facetious but very seriously, I would not want to take oath [sic] that I have never seen that man. I would like to see him and then I think I would be better able to tell whether I had ever seen him.

Hiss did not, however, immediately get his demanded confrontation. There intervened a second session with the Subcommittee on August 16, 1948. Hiss, by this time realizing that his accuser had testified in some detail as to his (Hiss's) personal life and family, described with some tentativeness,[5] his recollection of a man "—and he may have no relation to this whole nightmare—. . . named George Crosley," whom Hiss identified as a free-lance writer he had known in 1934 and 1935. Hiss said that "Crosley" and his family had stayed at his home for several days.[6] Hiss further said that he sublet an

5 Hiss testified as follows:

> Mr. HISS. I have written a name on this pad in front of me of a person whom I knew in 1933 and 1934 who not only spent some time in my house but sublet my apartment. That man certainly spent more than a week, not while I was in the same apartment. I do not recognize the photographs as possibly being this man.
>
> * * *
>
> Mr. HISS. I can't believe, Mr. Nixon, that anyone could have stayed in my house when I was there . . . overnight on several occasions without my being able to recall the individual; and if this is a picture of anyone, I would find it very difficult to believe that that individual could have stayed in my house when I was there on several occasions overnight and his face not be more familiar than it is.

(The quotations in this note and notes 6 and 7 are taken from Hiss's testimony on the second trial.)

6 Hiss testified as follows:

> Q. And in the evening I dare say you saw [them] on two or three evenings, depending upon the number of evenings they stayed?
>
> A. Yes. We fed them while they were there.

apartment to "Crosley" for a number of months with free gas, electricity and phone;[7] furnished him with a car for two months and took care of it thereafter when "Crosley" was not using it;[8] and said that he had driven "Crosley" once from Washington to New York in his car.[9] Hiss repeated his demand to see Chambers and to hear his voice.

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7 Hiss testifiedas follows:

Q. We are going over these things separately now. We are agreed that you paid for the rent that you were obligated to pay?
A. Right.
Q. That you gave him the use of the furniture for which you did not charge?
A. Yes.
Q. You also paid and he did not assume to pay the cost for the electricity and for the gas?
A. That is my best recollection after all these years.
Q. And can we add to that the cost of the phone?
A. Yes.

8 Hiss testified as follows:

Q. Didn't you tell us that you gave [him] the car in the fall of 1935?
A. He took it for about two months then and brought it back, and it stayed in Georgetown all that winter.

* * *

Q. Parked on the street?
A. And [I] kept [it] in running order and so on. I would start it in the winter and keep the battery from going down and get the tires pumped up every now and then, and things of that sort.

9 Hiss testified as follows:

Q. And can you recall what the occasion for the trip was?
A. Well, my recollection is that I had told [him] at luncheon or some other occasion that I was going to New York and would be driving myself in any event, and he asked if he might go along, and I said I would be glad to have him come along.

* * *

Q. Can you recall what the general subject matter was or subject matters that you and [he] discussed on your ride up to New York?
A. Just the casual conversation you would have with anybody you were giving a lift or a ride to.
Q. Casual for five or six or seven hours?
A. Yes. It is a long trip.

The demanded confrontation between Hiss and Chambers finally took place on August 17, 1948, and proceeded thus:

> Mr. NIXON. Mr. Hiss, the man standing here is Mr. Whittaker Chambers. I ask you now if you have ever known that man before.
>
> Mr. HISS. May I ask him to speak? Will you ask him to say something?
>
> Mr. NIXON. Yes, Mr. Chambers, will you tell us your name and your business?
>
> Mr. CHAMBERS. My name is Whittaker Chambers. (At this point, Mr. Hiss walked in the direction of Mr. Chambers.)
>
> Mr. HISS. Would you mind opening your mouth?
>
> Mr. CHAMBERS. My name is Whittaker Chambers.
>
> Mr. HISS. I said, would you open your mouth? You know what I am referring to, Mr. Nixon. Will you go on talking?
>
> Mr. CHAMBERS. I am senior editor of Time magazine.
>
> Mr. HISS. May I ask whether his voice, when he testified before, was comparable to this?
>
> Mr. NIXON. His voice?
>
> Mr. HISS. Or did he talk a little more in a lower key?
>
> [CONGRESSMAN JOHN] MCDOWELL. I would say it is about the same now as we have heard.
>
> Mr. HISS. Would you ask him to talk a little more?
>
> Mr. NIXON. Read something, Mr. Chambers. I will let you read from—
>
> Mr. HISS. I think he is George Crosley, but I would like to hear him talk a little longer. . . . Are you George Crosley?
>
> Mr. CHAMBERS. Not to my knowledge. You are Alger Hiss, I believe.
>
> Mr. HISS. I certainly am.
>
> Mr. CHAMBERS. That was my recollection.
>
> * * *
>
> [COMMITTEE INVESTIGATOR] STRIPLING. You were going to read.

Mr. CHAMBERS (reading from Newsweek magazine):

"Tobin for Labor. Since June, Harry S. Truman had been peddling the labor secretaryship left vacant by Lewis B. Schwellenbach's death in hope of gaining the maximum political advantage from the appointment."

Mr. HISS. May I interrupt?

Mr. McDOWELL. Yes.

Mr. HISS. The voice sounds a little less resonant than the voice I recall of the man I knew as George Crosley. The teeth look to me as though either they have been improved upon or that there has been considerable dental work done since I knew George Crosley, which was some years ago.

* * *

I believe I am not prepared without further checking to take an absolute oath that he must be George Crosley.

Chambers then stated that he had had substantial dental work, whereupon the following transpired:

Mr. HISS. Could you ask him the name of the dentist that performed this thing? Is that appropriate?

Mr. NIXON. Yes. What is the name?

Mr. CHAMBERS. Dr. Hitchcock. Westminster, Md.

Mr. HISS. That testimony of Mr. Chambers, if it can be believed, would tend to substantiate my feeling that he represented himself to me in 1934 or 1935 or thereabout as George Crosley, a freelance writer of articles for magazines.

I would like to find out from Dr. Hitchcock if what he has just said is true, because I am relying partly, one of my main recollections of Crosley was the poor condition of his teeth.

* * *

Mr. NIXON. Before we leave the teeth, do you feel that you would have to have the dentist tell you just what he did to the teeth before you could tell anything about this man?

* * *

Mr. HISS. I am not able . . . to take an oath that this man is George Crosley. I have been testifying about George Crosley. Whether he and this man are the same or whether he has means of getting information from George Crosley about my house, I do not know. He may have had his face lifted. . . . Did you ever go under the name of George Crosley?

Mr. CHAMBERS. Not to my knowledge.

Mr. HISS. Did you ever spend any time with your wife and child in an apartment on Twenty-ninth Street in Washington when I was not here because I and my family were living on P Street?

Mr. CHAMBERS. I most certainly did.

* * *

Mr. NIXON. The question, Mr. Chambers, is, as I understand it, that Mr. Hiss cannot understand how you would deny that you were George Crosley and yet admit that you spent time in his apartment.

* * *

Mr. CHAMBERS. As I have testified before, I came to Washington as a communist functionary, a functionary of the American Communist Party. I was connected with the underground group of which Mr. Hiss was a member. Mr. Hiss and I became friends. To the best of my knowledge, Mr. Hiss himself suggested that I go there, and I accepted gratefully.

Mr. HISS. Mr. Chairman.

Mr. NIXON. Just a moment. How long did you stay there?

Mr. CHAMBERS. My recollection was about 3 weeks. It may have been longer. I brought no furniture, I might add.

Mr. HISS. Mr. Chairman, I don't need to ask Mr. Whittaker Chambers any more questions. I am now perfectly prepared to identify this man as George Crosley.

Up to this time Chambers had never told the Subcommittee or anyone else that Hiss had been involved in any form of espionage or obtaining United States government documents for delivery to the Soviet Union. Chambers had limited his accusation to that of Communist affiliation. *See* p. 978, *supra*. Following the confrontation, and apparently in light of this limited accusation, Hiss demanded that Chambers repeat the charge outside of the "privileged" Subcommittee hearings so that Hiss could sue him for defamation. Chambers did repeat his charge in nonprivileged circumstances, and Hiss commenced a libel action against him in the United States District Court in Baltimore. There, in the course of taking Chambers's pretrial testimony, Chambers was asked whether he had received any correspondence or documents from Hiss. Chambers responded affirmatively and the following day, November 17, 1948, produced four handwritten notes and sixty-five typewritten pages. These documents, Hiss was to acknowledge, were either summaries or copies of the entirety of War Department and State Department documents of some consequence stemming from the period January to March, 1938. Hiss at a later point also conceded that the handwritten notes were in his hand[10] and admitted that most of the typewritten documents (which came to be called the "Baltimore documents") were typed on the Woodstock typewriter belonging to Mrs. Hiss which had been in their apartment for a number of years.[11]

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10 As to recognizing one of them he needed some assistance:

> Q. At what point prior to the trial did you become reasonably sure that that document was in your handwriting?
>
> A. I could not fix the exact date, but some time in the course of preparation for the first trial.
>
> Q. Well, what facts did you have which made you reasonably sure?
>
> A. Well, I asked a handwriting expert what he thought it was, and he showed me an enlargement of it, and once it was enlarged I had no doubt that it was my handwriting; I could see it; but in its original form it still does not look like it.

11 Hiss's lawyer was to state at the second trial:

> I am going to speak now of the typewriter. The Government expert said that in his opinion these Baltimore exhibits were typed

These documents were forthwith turned over to the United States Department of Justice,[12] and a grand jury investigation was commenced in the Southern District of New York.

Chambers's disclosure of the documents and the fact that the Hisses had disposed of the typewriter a number of years earlier[13] led both the FBI and Hiss's counsel to bend every effort to find it. The government sought the typewriter to corroborate Chambers's story. Hiss's counsel, on the other hand, sought the typewriter to support the Hisses' later explanation that they had given the typewriter to a former maid, Claudia Catlett, and her children prior to the earliest date of any of the Baltimore documents, and that, consequently, neither Mr. nor Mrs. Hiss could have copied the documents as Chambers claimed. It followed, Hiss was later to urge, that one of Chambers's confederates must have located the type-

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on the [Hisses'] Woodstock typewriter. Undoubtedly that is a good opinion. As I told you in the opening, we consulted experts, and in their opinion they thought so too. But it is not the question of what was used but who the typist was.

Hiss had earlier testified in the grand jury as follows:

Q. To go back to my question. I would like you to state to the grand jury any possible explanation that you might have for the possibility of anybody having access to that typewriter, that Woodstock typewriter, during the period of 1937 and 1938?

A. Quite frankly, the only explanations I have been able to think of, Mr. Donegan, are [Chambers] having got entry to my house, his having bribed a servant in order to get access to the typewriter, or our having disposed of it earlier than our recollection is, and he somehow having found that out. I do not know of any other explanation.

12 Chambers later turned over to HUAC certain undeveloped rolls of microfilm which he had also kept. The developed film included pictures of three State Department cables bearing, Hiss later was to acknowledge, Hiss's initials in his own hand.

13 Initially Hiss told the FBI that the typewriter had been in his home "from 1936 to some time after 1938" and that Mrs. Hiss had thereafter disposed of it "to either a second-hand typewriter concern or a second-hand dealer in Washington, D.C."

writer at the maid's home[14] and surreptitiously used it to copy the State Department documents which, Hiss claimed, Chambers had gotten from persons other than Hiss.

Since both sides were seeking the typewriter, one of Hiss's leading counsel, Edward McLean,[15] concluded that cooperating and keeping in touch with the government in the search was in the best interests of his client.[16] Consequently, there was a number of contacts between McLean and his staff and the FBI during this time, not only with regard to the search, but also with respect to other subjects, including Hiss's furnishing the FBI with samples of typing from the machine.[17]

On December 15, 1948, however, the situation changed, for the grand jury, which had heard testimony from a number of

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14 Hiss's lawyer so argued in summation on the second trial:

> I say, well, how did Chambers know about that? How did he get it? Anybody? He did not do it himself, you can bet your life on that. He gets through confederates, anybody who can get through confederates and steal top secret documents from the State Department would not have much trouble locating a big office typewriter. Now I can suggest there might be several ways. I can suggest a way that he could have easily found out. Suppose someone had called up, or come over, when he knew the Hisses weren't there, and asked Clidi, [the Hisses' maid] saying that they were a typewriter repair man and had come to repair the Woodstock typewriter. What would she have said: "Why, they have given it to my boys." He wouldn't have much difficulty locating Clidi's place, and with that open house, with the cellar there, I mean the closet; with all the people coming and going, all the people living there, and their friends, and the dances and all. How easy. Am I talking through my hat? Have I got any basis for that?

15 Both McLean and the chief prosecutor, Thomas F. Murphy, became judges of this Court. Judge McLean is now deceased. Judge Murphy is today on senior status.

16 McLean expressed his view of the importance of locating the Woodstock typewriter when, on April 16, 1949, it was finally located in the possession of a junkman, Ira Lockey. McLean, in buying it said, "If this is the typewriter, it will probably save a man from [a] jail sentence."

17 Hiss, himself, acknowledged the fact of this cooperation during his testimony at the second trial.

witnesses over a month, including Mr. and Mrs. Chambers and Mr. and Mrs. Hiss, indicted Hiss on two counts of perjury. The indictment, as recited earlier, alleged in essence that Hiss had given false testimony that 1) neither he nor Mrs. Hiss delivered any copies or summaries of State Department documents to Whittaker Chambers and 2) that he definitely had not seen Chambers after January 1, 1937.

It is appropriate to note at this point that notwithstanding Hiss's present claim that the prosecution had all the advantages in its preparation for trial, it was, in fact, Hiss who located the typewriter. Further, I observe, that following the indictment, Hiss, pursuant to an unusual ruling by the Maryland District Court, was permitted to continue deposing Chambers, now having a full awareness of the Government's criminal charges and thus being able to focus the questioning accordingly. Consequently, Chambers was further questioned for two full days by McLean on, among other things, the circumstances surrounding Chambers's receipt of the documents. Hiss was also given unrestricted access to the Government's documentary evidence, and thus came to his trial having had a rare and unrestricted exploration of the heart of the prosecution's case.

THE TRIALS

The first trial took place between May 31 and July 7, 1949 and ended in a jury disagreement. The second trial commenced on November 17, 1949 and concluded with a conviction on both counts on January 25, 1950.

Chambers testified at both trials essentially as follows: In June or July, 1934, he was introduced to Hiss by J. Peters, head of the American Communist Party underground, and Harold Ware, the principal of a secret Communist organization in Washington, D. C. It was agreed at that time that Hiss was to be "disconnected" from Ware's "apparatus" and become a member of a parallel organization which Chambers was charged with organizing. At first, Hiss, who was then counsel to the Nye Committee, which was investigating the

munitions industry, furnished Chambers with copies of confidential State Department documents.[18] Later, in early 1937, when Hiss joined the State Department, every seven or ten days he surreptitiously removed important documents and brought them to his home where Chambers picked them up, took them to Baltimore for photocopying, and returned them to Hiss that same night. This practice continued until the middle of 1937, at which time the plan changed and Hiss began taking State Department documents on a daily basis to be copied on a typewriter,[19] either verbatim or in substance. Every ten days or so Chambers picked up the typewritten documents as well as Hiss's handwritten notes about other documents which Hiss had examined.[20] Chambers took this material to Baltimore for photocopying and then turned over the films and on some occasions the handwritten notes to one Colonel Bykov, a Soviet spy. This continued from mid-1937 until April, 1938, when Chambers finally broke with the Communist Party. It was at that time that he retained and hid the so-called "Baltimore documents" in his wife's nephew's unused dumbwaiter shaft in a Brooklyn apartment house.

In addition, Chambers testified to his family's stay at the Hisses' home, the sublet of Hiss's apartment and the use of the car. *See* pp. 978-979, *supra*. He also testified concerning his and his wife's personal friendship with the Hisses, which included not only the trip to New York City, *supra*, but other trips to Erwinna, Pennsylvania, Long Eddy, New York, and Peterboro, New Hampshire. Mrs. Chambers corroborated her

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18 One Julian Wadleigh, an official in the Trade Agreements Division of the State Department—and a prosecution witness on the trial—also furnished Chambers with State Department documents.

19 The plan, according to Chambers, was for Mrs. Hiss to type them.

20 Relevant to an issue raised by Hiss on this motion is the fact that on cross-examination Chambers testified at some length about also receiving stolen State Department papers from Julian Wadleigh, in the period 1936 through 1938, and mentioning him to Berle—but not the FBI—in the period 1939 through 1946. *See* pp. 989-991, *infra*.

husband's testimony by testifying at great length about their social acquaintance with the Hisses.

During both trials Chambers was subject to rigorous cross-examination on his credibility and motivation, with minute probing of numerous contradictory prior statements made by Chambers regarding Hiss's Communist affiliation, Hiss's espionage activities, and his own involvement with the Hisses—much of which was either under oath before HUAC or in the libel case or before the grand jury.

Hiss, on the trial, utterly denied being a Communist and all of Whittaker Chambers's other charges, including the transmission of documents:

> Q. Mr. Hiss, I show you what has been referred to as Baltimore Exhibits 1 to 4. Are those in your handwriting?
>
> A. They are.
>
> Q. Did you ever give those to Whittaker Chambers?
>
> A. I did not.
>
> Q. Did you ever give them to any person unauthorized to receive such documents?
>
> A. I did not.
>
> Q. I show you Baltimore Exhibits 5 to 47, and I will ask you if you ever delivered a single one of those papers to Whittaker Chambers?
>
> A. I did not.
>
> Q. Or to anyone else who was not authorized to receive documents?
>
> A. I never delivered these to anybody.
>
> Q. Did you ever see those before?
>
> A. I have never had these papers in my hand until just now.
>
> Q. And were these documents ever typed in your house by Mrs. Hiss or by anyone else, to your knowledge?
>
> A. They were not typed in my house nor by Mrs. Hiss. I have no idea where or how they were typed.

Hiss testified that he knew Chambers as "Crosley," *see* pp. 978-980, *supra*, and while acknowledging the subletting of the apartment and furnishing the car, etc., testified to an otherwise

very limited relationship. Both he and his wife denied most of the extensive social relationship that Chambers and his wife had described in their testimony. Hiss testified that the last time he had seen Chambers prior to the 1948 HUAC confrontation was in May or June of 1936.

The defense trial strategy, it appears, was to contrast Chambers, the Communist, atheist, fornicator, Soviet espionage agent, with—as Hiss's counsel argued in summation at the first trial—

> Alger Hiss, a brilliant young member of the State Department; everywhere he has been and everywhere he has gone and everything he has done and every trail that he has left behind is pure, wholesome, sound, clean, decent, fine.

Chambers's testimony, however, was corroborated in many critical areas by unassailed, independent evidence, much of it documentary.

The single most damaging corroboration—made even more damaging because Hiss conceded its truth—was the testimony of Felix Feehan, a document examiner employed by the FBI. His testimony was based upon his comparison of the "Hiss standards,"[21]—four documents concededly typed by Mrs. Hiss on the Hisses' Woodstock machine—with the "Baltimore documents," which Chambers had produced at his deposition in the libel action and which he testified had been given him by Hiss.

This document comparison caused Feehan to conclude and, in substance, testify at both trials that "the same machine was used to type Baltimore Exhibits 5 through 9 and 11 through 47 that was used to type the [Hiss] standards. . . ." As observed above, Feehan's conclusion not only was *not* challenged by Hiss but, indeed, Hiss's counsel at his second trial, conceded both in his opening statement and in summation that the

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21 The Hiss "standards" consisted of: a letter addressed to one Mr. Hillegeist, Director of Admissions, University of Maryland; a letter dated June 12, 1937 to Miss Hellings, Free Library, Philadelphia; Report of the President of Bryn Mawr Alumnae Association of Washington, D. C. for the year 1936-1937; and a memorandum dated September 9, 1936 entitled "Description of Personal Characteristics of Timothy Hobson".

experts retained by the defendant agreed with Feehan's conclusion.[22] *See* n.11, *supra*.

Also obviously highly damaging to Hiss's case was Chambers's possession of four notes in Hiss's hand and the film of three State Department cables bearing, Hiss conceded, his handwritten initials.[23]

Other highly damaging matters were Hiss's possession of an oriental rug which he admitted he had been given by "Crosley" and the fact of a certain $400 loan to which Chambers testified and which Hiss denied.

With respect to the oriental rug, Chambers testified that it was one of four he purchased in approximately December, 1936, on instructions from Colonel Bykov, the Russian espionage agent, and that it was given to the Hisses as a "gift

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22 Hiss claims that Feehan's testimony was "truncated" in order to avoid problems with the date of manufacture of the typewriter. I note, however, that at the time of Feehan's testimony on the first trial, the Woodstock typewriter, serial # 230,099, later defendant's Exhibit UUU at trial, was in the possession of Hiss's counsel, and was not available to the prosecution. The Government had had no opportunity to inspect the machine or take typing samples from it for comparison with the Baltimore documents or the Hiss "standards." It was not until the period between the first and second trials that an order was signed permitting the Government to take specimens from Exhibit UUU. It is of course significant that the FBI laboratory concluded that Exhibit UUU was in fact used to type both the Baltimore documents and the Hiss standards. Feehan did not, however, expand his testimony to include this for understandable reasons. *See* p. 996, *infra*.

23 *See* n. 10, *supra*. Hiss claimed that he made such notes for the purpose of conferring with his superior, Francis Sayre, and suggested that they were stolen from his desk or wastepaper basket. According to Hiss's secretary's testimony, however, theft was next to impossible given existing security precautions. Sayre, too, undercut this story, testifying that he had no recollection of Hiss writing notes similar in form to the four Chambers possessed, that they "differed markedly" from others which Hiss had prepared for him, and that the subject matter of one of the four handwritten notes had no relationship to either his or Hiss's areas of concern at the State Department.

from the Soviet people in recognition of the work of the American Communists."[24]

The Hisses admitted receipt of the rug. There was a record of storage payments for the rug in the Hisses' checkbook, and members of the Catlett Family, Hiss's principal witnesses respecting relinquishment of the Woodstock typewriter, *see* p. 995, *infra,* recalled seeing it. Hiss stated, however, that the rug had been given to him as "part payment" or a "gift" since Chambers ("Crosley") had not paid rent as promised on the sublease of their Twenty-eighth Street apartment. According to Hiss, "Crosley" had received the rug from a wealthy patron.

Chambers's version of the circumstances concerning the rug was corroborated, however, by Professor Meyer Shapiro, a noted professor of art history at Columbia University, who testified that Chambers asked him to purchase four such rugs and arrange for their delivery to Silverman in Washington, D.C. Shapiro's testimony was, in turn, corroborated by the testimony of one Edward Touloukian, an employee of the import company through which the four rugs were purchased.

As to the loan transaction, Chambers testified that in November, 1937, in preparation for his break with the Communist Party, he borrowed $400 in cash from the Hisses which he used to purchase an automobile. Chamber's use of such an amount of cash for the purchase of a car at that very time was verified by the records of the dealer from which the car was purchased, and the records of Hiss's bank reflected a withdrawal of $400 from Hiss's account four days prior to Chambers's purchase of the automobile.[25]

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24 Wadleigh, as mentioned earlier, another source of State Department documents for Chambers, testified that in the last week of December, 1936, he too, received an oriental rug from his principal "contact" in the Soviet underground.

25 Hiss and his wife claimed that the $400 withdrawal was to facilitate the purchase of household goods for a house they purchased at Volta Place, Washington, D.C. The prosecution proffered evidence, however, that at the time of the alleged purchases, 1) the Hisses had not closed the real estate transaction involving Volta Place, 2) they maintained checking accounts and credit charges in the major Washington, D.C. stores and thus had no need for $400 in cash to make the purchases claimed, and 3) these alleged cash purchases were at odds with their financial habits and practices.

Corroboration of Chambers's testimony of a close social relationship with the Hisses came from the fact that Chambers purchased a certain Westminster, Maryland farm which Hiss previously had had under contract. According to Chambers, Hiss drove him to and showed him the Westminster farm in early 1935 at a time when Hiss intended to buy it. When Hiss withdrew from the deal, however, Chambers went ahead and bought the property himself. Hiss acknowledged that during April and May 1936, he had indeed negotiated for the purchase of the farm. He denied, however, taking Chambers to the farm, and, when asked if he had mentioned the negotiations to Chambers, he said, "I don't remember doing so. I certainly might have." The "coincidence" that Chambers, with whom Hiss denied any sort of a close relationship, could independently have learned of the availability of this very farm for later purchase was a most damaging one.

There was also independent testimony of the Hisses' visits to the Chambers residence. Edith Murray, the Chamberses' family maid in 1935 and 1936, testified to having seen Mrs. Hiss on several occasions and Mr. Hiss on one occasion at the Chambers residence at 1617 Eutaw Place, Baltimore, Maryland. In view of Hiss's firm denials of ever having been at any of the Chambers's residences, this testimony, too, was highly damaging.

On the foregoing and other evidence, the jury found Hiss guilty on both counts of the indictment. In affirming the conviction, the Court of Appeals for the Second Circuit wrote:

> The jury might well have believed that the appellant had been less than frank in his belated recognition of Mr. Chambers as a man he had known as Crosley and had admittedly known well enough to provide for him a partly furnished apartment at cost with all utilities free to say nothing of an automobile, old certainly, but still useful. The jury had ample evidence other than the testimony of Mr. Chambers on which to find, as it evidently did, that the documents of which Mr. Chambers produced copies were all available to Mr. Hiss at the State Department and

that finding, coupled with the admitted fact that they were copied on a typewriter which the jury could well find was used for that purpose when in the possession of Mr. Hiss in his home, supplied circumstances which strongly corroborated the testimony of Mr. Chambers. Indeed, such known circumstances tend to fill out a normal pattern of probability when so interpreted, while in attempting to reconcile them with the appellant's denial of association with the delivery of State Department documents, or their copies, to Mr. Chambers, one approaches the realm of sheer speculation. To the prosecution's theory that the appellant abstracted those copied documents and took them home where they were copied on a typewriter which the jury could, and doubtless did, find was then in his home, the only possible alternative is that one or more others abstracted them (for there is not the slightest evidence or suggestion that this Woodstock typewriter was ever in the State Department) and then took what pains were needed to copy them, or have them copied, on that particular typewriter either at the Hiss home or elsewhere on some later date and, if at the Hiss home, unbeknown to Mr. or Mrs. Hiss. Obviously that would have entitled some risk of detection by the Hisses which the use of some other means of copying would not have involved. It seems abundantly clear that the jury was amply justified in believing that these circumstances did not indicate some ulterior motive to harm the appellant at some future date but in believing that they pinned the abstractions and deliveries fast to the appellant himself. The foregoing is an attempt not to summarize the mass of evidence introduced at the trial below, but only to show, as we think it does, that there was independent evidence sufficient as a matter of law, if believed and so considered by the jury, to substantiate the testimony of Mr. Chambers in compliance with the rule in perjury cases as to both counts. *United States v. Hiss, supra,* 185 F.2d at 830.

The Supreme Court thereafter denied *certiorari,* 340 U.S. 948, 71 S.Ct. 532, 95 L.Ed. 683 (1951).

THE WRIT OF ERROR *CORAM NOBIS*

The writ of error *coram nobis* which Hiss now seeks is an extraordinary remedy to be allowed "only under circumstances compelling such action to achieve justice." *United States v. Morgan,* 346 U.S. 502, 511, 74 S.Ct. 247, 252, 98 L.Ed. 248 (1954). Its purpose is to correct errors "of the most fundamental character." *United States v. Mayer,* 235 U.S. 55, 69, 35 S.Ct. 16, 19, 59 L.Ed. 129 (1914). This is necessarily so, for obviously issuance of the writ is tantamount to acquittal. *United States v. Keogh,* 440 F.2d 737, 741 (2d Cir. 1971). The government has little if any interest in reprosecuting a defendant who served his sentence more than 25 years ago. Indeed, with Whittaker Chambers, the principal witness for the government, dead, reprosecution appears a virtual impossibility.

The burden of overcoming the presumption that the original proceedings were correct rests with Hiss, *United States v. Morgan, supra,* 346 U.S. at 512, 74 S.Ct. at 253, and the mere fact that Hiss has made certain allegations does not automatically entitle him to an evidentiary hearing. Such may be accorded only where

> the petition alleges *facts* which would support a claim of deprivation of constitutional right . . . and some material issue of fact is in dispute.

United States v. Tribote, 297 F.2d 598, 600 (2d Cir. 1961) (emphasis supplied).

HISS'S ALLEGED DEPRIVATION OF THE EFFECTIVE ASSISTANCE OF COUNSEL

Hiss first attacks his conviction on the ground that he was "deprived of the effective assistance of counsel guaranteed to him under the Sixth Amendment." He bases this claim on the fact that *after* December 15, 1948, the date of Hiss's indictment, Horace Schmahl, an investigator hired by McLean, had one contact with the FBI and one contact with prosecutor Thomas F. Murphy.[26] In each of these contacts[27] Schmahl

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26 Hiss implicitly acknowledges both that preindictment contacts were authorized and that prior to indictment there is no Sixth Amendment right to

related information about an area the defense was investigating.

The first such contact was a phone call by Schmahl to Agent Shannon of the FBI advising Shannon of McLean's *new* request to Schmahl to investigate an application for credit made by Mrs. Chambers. The second contact was Schmahl's statement to the chief prosecutor that the defense had attempted to locate an old Woodstock typewriter and had specifically inquired about such at the firm of Adam Kunze in New York City. Murphy, it appears, asked the FBI to verify this.

In the first instance, these "intrusions" must be viewed against the substantial history of authorized cooperation between the defense and the government which McLean was fostering in the three-month period prior to indictment,[28] on numerous subjects such as finding the Hisses' Woodstock. *See* p. 982, *supra.*

Second, the two post-indictment contacts of which Hiss now complains concerned the same subject matters as to which Schmahl had been authorized to talk to the government prior to the indictment. Thus, Schmahl had spoken to the government on December 11, 1948, about the defense's investigation of Mrs. Chambers's alleged use of another person's name to get credit in stores, and an FBI memorandum dated December 8, 1948, reveals that the Bureau had spoken with Schmahl on the subject of locating specimens of typing from Hiss's typewriter. The memorandum goes on to state that the Bureau preferred to deal with McLean rather than Schmahl because of the Bureau's sensitivity to the importance of "avoid[ing] any difficulty over his [Schmahl's] activity." Schmahl, it seems, was an investigator whose tactics were known to the Bureau to be

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counsel into which the prosecution could have "intruded," *Ostrer v. Aronwald,* 434 F.Supp. 379 (S.D.N.Y.), *aff'd* 567 F.2d 551 (2d Cir. 1977).

27 Whether, as Hiss asserts, there were more contacts than these two is, on the record before me, only speculation.

28 This is in the very same time period that Hiss, himself, with his counsel's approval, submitted to extensive questioning by the FBI.

questionable. It appears that in the course of his work he was misrepresenting his relationship to the FBI, and thus wished to maintain close contact with the FBI for personal reasons. This was itself troublesome to the Bureau.[29] The Bureau, on the other hand, was reluctant to cut off contacts with Schmahl completely because he was providing possibly valuable information to it on other unrelated cases.

In any event, Hiss has raised no serious question as to the Bureau or the prosecutor's office *seeking* to take improper advantage of Schmahl's role as a go-between. But of even more critical importance is the fact that the information that Schmahl communicated during the period of preparation for the first trial could not have had the slightest impact on the outcome of the second trial.[30]

Before a judgment of conviction can be vacated on the ground of improper contact between the prosecution and the defense, two determinations must be made: first, that a Sixth Amendment violation occurred, and second, that

> there [was] some communication of *valuable information* derived from the intrusion to the prosecutor or his staff in order that there can appear some *realistic* possibility of prejudice to the defendant. (emphasis supplied).

Klein v. Smith, 559 F.2d 189, 197 (2d Cir.), *cert. denied,* 434 U.S. 987, 98 S.Ct. 617, 54 L.Ed.2d 482 (1977). *See Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).

In this case no valuable information having been communicated, there could not conceivably have been any realistic

29 Schmahl, to the Bureau's knowledge, falsely represented himself on more than one occasion as being associated with the FBI, or "an ex-FBI man."

30 Hiss's reference to Schmahl's having "turned over the results of his investigation. . ." confidentially to an administrative assistant to the United States Attorney as stated in a September 22, 1949 memorandum, not only fails to state what was turned over, but as revealed by the FBI interview of Schmahl of December 11, 1948, clearly refers to an authorized pre-indictment turnover. *See* p. 982, *supra*.

possibility of prejudice to Hiss, particularly in light of the standard to be applied on *coram nobis*.[31]

THE ALLEGED SUPPRESSION OF THREE "STATEMENTS" OF CHAMBERS

Hiss next contends that the prosecutor suppressed three "statements" by Chambers[32] which, had Hiss been furnished

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31 A six-sheet defense document dated December 28, 1948—thirteen days after the indictment—entitled "Outline of Investigation" was found in the prosecution's files. There is no showing as to how or when it got there. There is no evidence that Schmahl furnished it. One third of its items have to do with the typewriter and samples of Hiss's typing which were the subject of earlier extensive cooperation between Hiss's counsel and the government. The balance lists further areas of inquiry obvious to anyone then familiar with the case. The document contains nothing that could have been construed as truly prejudicial. Moreover, assuming that this and other transmittals of information were indeed both improper and prejudicial, a government intrusion into the defense camp simply "invalidates the trial at which it occurred." *Caldwell v. United States*, 205 F.2d 879, 881 (D.C.Cir.1953); *Coplon v. United States*, 191 F.2d 749, 759 (D.C.Cir. 1951). No transmittal of information occurred which could have affected the second trial. Thus, "if the [first] trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside . . .," *Hoffa v. United States*, 385 U.S. 293, 307, 87 S.Ct. 408, 416, 17 L.Ed.2d 374 (1966), and the remedy for a violation would have been a second trial. But Hiss *had* a second trial, well subsequent to the events about which Hiss complains of above and all of which occurred prior to the *first* trial.

32 Hiss's claim that the prosecutor suppressed the subject materials by stating at the second trial, "no statements were made by this witness," is a gross distortion of what actually occurred. In context that statement reads:

> Mr. MURPHY: Your Honor, as I understand the witness's testimony there were no statements made by this witness.
>
> Mr. CROSS: I understand that the F.B.I. have [sic] two statements.
>
> Mr. MURPHY: Shall we ask the witness again whether he gave a statement? As I understand [it,] he said he did not give a statement.
>
> * * *
>
> Mr. CROSS: There were certain statements produced at the first trial, one dated May 14, 1942, and the other dated June 26, 1945, statements taken, as I understand, by the F.B.I. and were submitted to the Court at that time. Those are the two that I am asking for.

them, would have enabled him to "decimate the prosecution's case and its star witness, Chambers." The three "statements" are 1) a 184-page draft of a statement prepared by the FBI from their interviews of Chambers between January 3 and April 18, 1949, 2) an FBI report dated March 28, 1946, reciting an interview that day of Chambers, and 3) an undated handwritten statement by Chambers, obviously written after the indictment and turned over to the FBI on February 15, 1949 on the subject of his homosexuality.

From the denial of the 184-page statement Hiss claims he was deprived of knowledge of the following contradictions of Chambers's testimony: 1) that the Hiss loan for the car was $500, not $400, and 2) the fact of a recital to the FBI of numerous contacts with Julian Wadleigh, which, recital he claims, Chambers denied on the trial. From the 1946 FBI report Hiss claims he was deprived of additional prior statements by Chambers 1) that he, Chambers, had no evidence of Hiss's espionage, and 2) that he, Chambers, left the Communist party in 1937. Finally, from the handwritten statement

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> Mr. MURPHY: For the record, your Honor, there are no statements by this witness for that time. I think what Mr. Cross is referring to are two F.B.I. reports written by an agent, some of which concern statements made by this man to an agent orally. If Mr. Cross wants me to submit to your Honor F.B.I. reports concerning those statements, I believe, one, I have no objection to showing them to your Honor; two, I believe defense counsel should not see them because they are not statements of the witness. They are official F.B.I. reports.
>
> The COURT: If I understand correctly this witness made no statements. These are really reports by the F.B.I. agents, if I understand.

Further, the prosecutor at the time of turnover added:

> Mr. MURPHY: Your Honor, so that the record can be quite accurate I am handing you two F.B.I. reports. They are not statements. One is dated May 14, 1942, and the other June 26, 1945, and again I repeat that even if you do find something in there by an agent which appears to be inconsistent, that then you cannot even give it to the defendant's counsel because there again is the same recording made by an individual, not the witness, and under no theory of law can a witness be accountable for what somebody else has put on paper, . . .

Hiss claims he was deprived of Chambers's acknowledgement that he was a homosexual which Hiss claims his counsel could have used to "illustrate [to the jury] the self-torture which Chambers's perception of his homosexuality caused him and the impact this had on his relationship with individuals including Hiss . . . ."

Before considering these contentions, two threshold observations need to be made. First, the law regarding the production of a statement by a witness was quite different in 1950 than it is today. Both of Hiss's trials antedated *Jencks v. United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), and the Jencks Act, 18 U.S.C. § 3500 (1957), which now requires the prosecution to turn over to the defense any "statement"[33] by a witness to the extent that its contents "relates to the subject matter of the testimony [on direct examination] of the witness."[34] At the time of the Hiss trials, however, the applicable rule was that a defendant had to establish—usually by cross examination—that a witness had theretofore made a *signed* statement, containing a material contradiction. Upon such a showing the court would examine the statement *in camera,* to determine if it did in fact contain such a material contradiction. If it did, the relevant part would be turned over to defense counsel for further cross examination. *Gordon v. United States,* 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953); *United States v. Krulewitch,* 145 F.2d 76, 78-9 (2d Cir. 1944); *United States v. Ebeling,* 146 F.2d 254, 256-7 (2d Cir. 1944).

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33 The term "statement" is defined by the Jencks Act as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

34 The *Jencks* rule is one of evidence and procedure only, not one of constitutional dimension. There is therefore no requirement of retroactive application. *United States v. Gandia,* 255 F.2d 454 (2d Cir. 1958).

The second threshold observation is that Hiss's counsel did not ask the government at either trial for statements Chambers had made *after* August 3, 1948, which was the date Chambers had first testified publicly before HUAC. On the first trial, Hiss's counsel specifically asked only for

> Grand jury minutes; the notes of what this witness said the FBI agents took when he questioned him in 1943, and the statement in 1945 which he said he did not sign . . . .

Hiss's counsel at the first trial restricted himself to this notwithstanding the fact that Chambers had already testified that he gave the FBI *three* statements in December, 1948, and the prosecutor had also stated:

> I have different statements that this man gave.[35]

On the second trial Hiss's counsel again asked only for

> all other reports of the FBI up to August 3, 1948 . . . .

Thus on both trials Hiss was looking for Chambers's statements *prior* to his first appearance at HUAC. His concentration on these statements is not surprising in view of the fact that 1) Hiss already had all of Chambers's extensive testimony before HUAC in the summer of 1948, 2) Hiss had Chambers's testimony which his own lawyers had taken in the Baltimore action both before and after the indictment on December 15, 1948, and 3) Hiss had Chambers's grand jury testimony of November and December, 1948. Given the state of the law at the time of the trials and Hiss's request only for statements made prior to August 3, 1948, Hiss may not now fault the prosecutor for failing to turn over either the 184-page unsigned 1949 statement or the handwritten statement delivered to the FBI in February, 1949.

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35 Hiss's counsel did not further explore these on either trial, and this statement alone disposes of any claim that the prosecutor was suppressing any statements.

A. *The 184-Page Statement*

As stated above, between January 3 and April 18, 1949, the FBI conducted a number of interviews with Chambers. The notes of these interviews were then edited by the FBI into a first-person 184-page statement that Chambers apparently reviewed to some extent but never signed—the Bureau thereby taking advantage of the *Krulewitch* rule, *supra,* to avoid possible "complications". The document recounts Hiss's payment of Communist Party dues through Chambers, the Chamberses' rent-free use of the Hiss apartment on Twenty-eighth Street, N.W., in Washington, Alger Hiss's gift of a Ford automobile to the "open Communist Party", Chambers's receipt of Nye Committee documents from Hiss, and Hiss's receipt of an oriental rug from Bykov as a gift from the Russian people. Most importantly, it describes in detail Hiss's transmission of State Department documents to Chambers for photographing and dates Chambers's break with the Communist Party as April, 1938.

Hiss now claims that the information contained in the document would have enabled him to "decimate" the government's case. First, Hiss claims that in the 184-page document Chambers recalled that Hiss had loaned him $500 to purchase a car. Chambers later testified, however, that the amount of the loan was $400. *See* p. 985, *supra.* Not only do I regard the difference between $400 and $500 as modest but other evidence indicates that Chambers's trial recollection was in fact the correct one. Hiss's bank's records showed the withdrawal to be $400, and Chambers's car dealer's records corroborate that amount. I fail to see how the recollection of $500 at the time of the 184-page statement could have had even a minimal impact on the jury. I regard the inconsistency as minor in the extreme.

A second alleged inconsistency which Hiss discovers in the 184-page statement upon close scrutiny does not in fact exist. The alleged conflict is asserted by Hiss's juxtaposing a quotation from Chambers's cross examination on the second trial

> Q. Did you mention [Julian Wadleigh] to the FBI?
> A. I did not, I believe.

—with the fact that Wadleigh is mentioned thirteen times in the 1949 statement to the FBI. Hiss further asserts this claimed conflict as a reason "the prosecutors decided it was imperative to conceal the existence of the statement from the defense." Hiss, however, has clearly taken the trial quotation out of context, for in context it is clear that Hiss's counsel *on the trial* was questioning Chambers about whether he had told the FBI about Wadleigh *prior* to August 3, 1948, *not afterwards.*[36]

Other claims of allegedly valuable impeaching material in the 1949 statement are of matter so minimal, if not specious, as hardly to require comment. Chambers's "prior inconsistent statement to [one Hedwig] Lore", as Hiss's memorandum labels it, turns out to be a statement to the FBI *by Lore* which Chambers denied when the FBI asked him about it.[37]

Finally, Chambers, in the course of telling the FBI that one William Crane did photograhic work as part of the espionage operation, is quoted as saying:

> I have been told that WILLIAM EDWARD CRANE, who [sic] I knew as PETE and KEITH, has stated that he did photographic work for me *in an apartment in Baltimore.* The description he has given of this apartment and its location, I have also been told, make it rather definite that he is referring to the SPEIGEL apartment, concerning which I have spoken above. In this connection I would

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36 The cross examination, which fills twelve pages of the printed record, culminates in the following question and answer:

> Q. At no time up to August 3, 1948, had you ever mentioned to the FBI the name Julian Wadleigh?
> A. That may be true.

37 The report reads as follows:

> According to LORE, [whom Chambers understood to be also connected with the Soviet apparatus] I had contact with two girls who were private secretaries to Assistant Secretaries of State and with a girl who was employed in a secretarial capacity for one of the high officials of the Department of Commerce; that from these secretaries I obtained copies of letters and confidential correspondence. I can only make the categorical statement that this is not true.

like to state that I have absolutely no independent recollection of CRANE having been in this apartment or having done photographic work there. In fact, it is only because of his ability to describe the apartment and its location that I can believe that he was ever there. I have also been informed that CRANE once lived in Baltimore, at which time he was supposedly working with me. This information likewise is new to me because the only places I can recall CRANE having lived are here in Washington and New York. (emphasis supplied).

Thereafter at the first trial Chambers testified:

Q. And where would you photograph them?

A. The documents were photographed in Baltimore at the apartment of Mr. Spiegel.

Q. And when you did not photograph them you said someone else did. Who was the someone else?

A. In the first instance it was Mr. William Crane, whose pseudonym was Keith.

and at the second trial he testified:

Q. And you say you had other people who did photographic work for you?

A. There were two others who did photographic work.

Q. Who were they?

A. One was Willaim Crane whose pseudonym was Keith or Pete, and one was David Carpenter.

The alleged inconsistency is insignificant.[38]

B. *The 1946 FBI Report*

The March, 1946 FBI report, while not a "statement," fell within the time period of Hiss's request. Nevertheless, the only

38 Hiss now claims that if he had had the 1949 statement he would have "learned" of this witness. *Yet he knew of this witness from the first trial. See* the quotation from the first trial earlier on this page. In addition, it is not apparent why Hiss would want to "learn" of this witness when Hiss took the position that Chambers *was* having documents photographed that had been purloined, but by others.

relevant material it contained was the FBI's recital that Chambers had told the FBI in 1946 that he had left the Communist party in 1937.

Chambers had, however, made the very same statement on numerous other occasions prior to August 3, 1948. He had told this to the FBI twice and once under oath to HUAC. All this was known to and extensively developed on cross examination by Hiss's counsel on the trial culminating in the following question and answer:

> Q. And isn't it fair to say that every statement you made up to [August 3, 1948] as to when you left the Party you had given the date 1937?
>
> A. I think it is probable.

Against this background, the unproduced March, 1946 FBI report was therefore merely cumulative, and even assuming it had been a signed statement, the failure to turn it over caused no prejudice to Hiss.[39]

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39 Hiss also calls to the Court's attention the fact that in the 1946 FBI report Chambers is reported as saying

> that as a matter of fact he has absolutely no information that would conclusively prove that HISS held a membership card in the Communist Party or that he was an actual dues paying member of the Communist Party even while he was active prior to 1937.

From this Hiss contends that "Chambers confesses that his entire testimony is unsupported by even a scrap of actual evidence." This patent *non sequitur* overlooks not only the documentary evidence, *see* p. 981 and n. 12, *supra*, but also disregards the context of the very report itself in which Chambers necessarily reaffirms, in the course of reciting his efforts to get Hiss to quit the party, his earlier statement to the FBI that Hiss was a member of the Communist Party. The report in that regard reads as follows:

> When he was asked whether or not he believed that Hiss might have broken with the Communist Party, he stated he had no reason to believe that he may have dropped out, and as a reason for this belief, explained that after he had broken with the Communist Party, he had made a special trip to Hiss'[s] home in Georgetown, Washington, D.C. with the purpose of talking Hiss into breaking away from the Party. Chambers explained that when he arrived that Hiss'[s] wife Priscilla was the only one there, and while Chambers momentarily excused himself to go to the bathroom, he observed Mrs. Hiss immediately go to the telephone obviously to get in touch

C. *The Handwritten Note*

Chambers's handwritten statement relating to his homosexuality[40] was not only written but also delivered to the government subsequent to the August 3, 1948 cut-off date of Hiss's request at trial.[41] In addition, its now claimed possible use would have had but peripheral value with little likelihood of admissibility.[42]

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with Party members. CHAMBERS immediately returned to the room and awaited the arrival of ALGER HISS.

When HISS arrived, they had dinner together at his home and then talked with him all night long in an effort to persuade him to leave the Party. He stated that with tears streaming down his face, HISS had refused to break with the Communist Party and had given as his reason for not breaking his loyalty to his friends and principles. CHAMBERS stated his reason in going to HISS in order to get him to break away from the Communist Party was that he personally thought an awful lot about HISS and considered him an intelligent and decent young man whose better judgment should have led him to break with the Communist movement. CHAMBERS pointed out in his opinion, one of the strongest reasons for HISS maintaining contact with the Communist Party was the fanatical loyalty to the Communist Party on the part of his wife.

40 That Hiss knew of Chambers's homosexuality long before trial is clear from two of the documents Hiss himself put before the Court on this motion. The first, McLean's "Outline of Investigation" dated December 28, 1948, *see* n. 31, *supra*, lists as an item to be pursued, "Further evidence of [Chambers's] homosexuality", and the second, McLean's memorandum of January 21, 1949 speaks of a possible "police record of Chambers' [sic] arrest for homosexuality. Further, it appears that one Ida Dailes had told Schmahl that she had left Chambers "because [he] was a homosexual." Schmahl told this to a possible defense witness that he was interviewing, a woman named Lumpkin, with whom he pursued this topic. Lumpkin then told it to the FBI when interviewed by the Bureau.

41 The statement contains the following:

> Alger Hiss's defense obviously intends to press the charge that I have had homosexual relations with certain individuals. With the resumption of pre-trial deposition it is necessary to face this.

42 According to a footnote in the government's reply brief, Allen Weinstein, the author of *Perjury*, dealing with the Hiss case, having had complete access to the Hiss defense files in doing his research, states that

Hiss now claims that the jury should have been informed of Chambers's homosexuality "not on the issue of homosexuality *per se*, but on the self-torture and admitted mental instability which his sexual feelings caused him." First, it should be noted, the statement does not suggest mental instability, and second, to the extent that Chambers was obsessive and had an admitted obsession with Communism, this was fully explored on cross examination at the trial.[43] Moreover, any homosexual

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Hiss considered putting on proof of Chambers's homosexuality but decided not to do so out of fear of suggesting Hiss's involvement in a homosexual relationship with Chambers or damaging the reputation of Timothy Hobson, Hiss's stepson, an admitted homosexual. I give this no consideration on this motion since it is not before me in affidavit form, but I am constrained to note that if true, it might explain why Hiss, notwithstanding receipt of many thousands of government documents under the Freedom of Information Act, and at first agreeing to make his files available to the government on this motion, changed his mind and declined to do so, thus depriving the government—and the Court—of possible additional light on the many subjects treated on this petition.

43 Among other things, Chambers was asked:

> Q. On August 25, 1948, were you asked these questions and did you give these answers before the House Committee—. . .
>
> Mr. NIXON: Yes, I mean, do you—is there any grudge that you have against Mr. Hiss over anything that he had done to you?
>
> Mr. CHAMBERS: The story has spread that in testifying against Mr. Hiss I am working out some old grudge or motives of revenge or hatred. I do not hate Mr. Hiss. We were close friends but we were caught in the tragedy of history. Mr. Hiss represents the concealed enemy against which we are all fighting and I am fighting. I have testified against him with remorse and pity but in the moment of history in which the nation now stands, so help me God, I could not do otherwise.
>
> [Q.] Did you so testify on August 25, 1948?
>
> A. I did.
>
> * * * * * *
>
> Q. After the first trial on either July 8 or July 9, 1949, did you make a statement to a reporter of the New York World Telegram to the effect that "I am very reluctantly and grudgingly step by step destroying myself so that this nation and the faith by which it lives may continue to exist"?
>
> A. I did.

relationship Chambers may have had—and in the statement he denies having had such with anyone in the Party—would, in my view, have had little if any relevance to the foregoing. Further, given the reasoning of such authorities as *United States v. Provoo*, 215 F.2d 531 (2d Cir. 1954) and *United States v. Nuccio*, 373 F.2d 168 (2d Cir.), *cert. denied*, 387 U.S. 906, 87 S.Ct. 1688, 18 L.Ed.2d 623 (1967), it is most unlikely that Chambers's homosexuality could have been injected into the trial as a general attack on Chambers's character.[44]

Finally, while not raised in his memorandum, Hiss's counsel contended on oral argument that the prosecutor, having Chambers's statement as to his homosexuality in his files, improperly cross examined the two psychiatrists called by the defense to give as their conclusion that Chambers was a "psychopathic personality" with a tendency to "false accusing". This conclusion of each of the psychiatrists was based on the assumed facts recited in a hypothetical question posed by defense counsel detailing Chambers's life that runs to twenty-four pages in the printed record. Dr. Carl A. L. Binger, the first, was thereafter asked on direct examination:

> Q. Will you tell us, Dr. Binger, what some of the symptoms of a psychopathic personality are?
>
> A. Well, they are quite variegated. They include chronic, persistent and repetitive lying; they include stealing; they include acts of deception and misrepresentation; they include alcoholism and drug addiction; abnormal sexuality; vagabondage; panhandling; inability to form stable attachments, and a tendency to make false accusations.

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44 Hiss now also seeks to legitimize this inflammatory evidence by suggesting that it was material to the testimony of Dr. Carl A. L. Binger, a defense psychiatrist. The purpose of that testimony was to demonstrate that Chambers was a pathological liar—in other words, to impeach Chambers's credibility. If evidence of Chambers's homosexuality was (as one must all but concede) inadmissible to demonstrate directly that Chambers was a liar, then it hardly becomes admissible as the basis of an "expert" opinion that Chambers was a liar.

The first of Hiss's attacks is to the following question on cross examination:

> Q. Now, Doctor, when you started to describe the different symptoms of a person with a psychopathic personality you ran through 12 or so, and you said chronic, persistent and repetitive lying; stealing, deception; alcholism [sic] and drug addiction; abnormal sexuality; vagabondage; panhandling. For our purposes, Doctor, we can eliminate immediately three of those, can't we—drug addiction, alcholism [sic] and sexual abnormality? *There is nothing in the hypothetical question that you have that even touches on any of those*?
>
> A. That is right. (emphasis supplied.)

This question, however, I deem not improper inasmuch as it inquired only as to those factors which the doctor had *considered* in rendering his opinion.[45]

On the other hand, the second psychiatrist, Dr. Henry A. Murray, who testified similarly, was questioned differently on cross examination:

> Q. And you have no *evidence* here, have you, Doctor, of drug addiction or alcoholism or sexual abnormality, *we have ruled those out, haven't we*?
>
> A. We have ruled out drug addiction and alcoholism. (emphasis supplied.)

Given the existence of Chamber's handwritten statement in the prosecution files, this question, in my judgment, was improper. Hiss's counsel on this motion, however, did not argue that the outcome of the trial in any way hinged on this question and answer,[46] and I do not view it as having affected the verdict in the slightest.

45 The fact of homosexuality could have been included in the hypothetical had Hiss wanted to establish the fact on the cross examination of Chambers or otherwise, for Hiss was certainly sufficiently aware of the fact to have had a good faith basis for questioning Chambers about it.

46 Indeed, counsel stated, "I would be the last one to argue that homosexuality has anything at all to do with credibility."

Finally, Hiss contends that the prosecutor had a duty to furnish all three of these "statements" to him as *Brady* material. Even assuming that the basic principle of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), existed in 1949 and 1950, having been foreshadowed by *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1934),[47] I do not see how these materials could have been considered "favorable" or "exculpatory" to Hiss. The 1946 FBI report and the handwritten statement certainly are not, and the 184-page statement of 1949 contains nothing but information damaging in the extreme. *See* p. 990, *supra*. Nothing contained in these three documents suggests that the prosecution in fact used perjured testimony—let alone *knowingly* used such testimony—nor is there any evidence of deliberate concealment as to any of them. Finally, in light of the applicable law, I conclude that they are not "material" in the constitutional sense.[48] They certainly do not "create[] a reasonable doubt that did not otherwise exist . . . ." *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2402, 49 L.Ed.2d 342 (1976). There was, therefore, no duty in 1949 and 1950 to turn these over to defense counsel under any equivalent of the theory thereafter articulated in *Brady*.

The ultimate conclusion as to these three "statements" is, therefore, that two of them were not statements as defined in 1950; two of them, including the one *that was* a statement, were not within the time frame for which defense counsel sought statements; and even if all three were statements and *had been* asked for, there was no prejudice to Hiss from not having them for use on the second trial.

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47 *See Shuler v. Wainwright*, 491 F.2d 1213, 1220 (5th Cir. 1974).

48 "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109—110, 96 S.Ct. 2392, 2400-01, 49 L.Ed.2d 342 (1976).

THE TYPEWRITER

Hiss next claims that he was "deprived . . . of a fair trial" because as to the Woodstock typewriter which he himself traced, bought, and put in evidence as "his" typewriter, "the FBI knew that it was impossible that this could be the correct machine as its serial number was much too high."[49]

It should be recalled that when, at Hiss's demand, Chambers produced—unexpectedly, one gathers—the documents which turned out to have been typed on Hiss's typewriter, both the government and Hiss began an intensive search for the machine and cooperated with each other to that end.[50] *See* p. 982, *supra*. The machine in question, originally purchased by Mrs. Hiss's father, Thomas Fansler, for his insurance partnership with one Henry L. Martin in the later 1920's, was given by Fansler to Mrs. Hiss in the early 1930's and one way or another left the Hisses' home in the later 1930's. *See* n. 13 and pp. 981-982, *supra*.

The Woodstock typewriter that was put in evidence on the trial by Hiss as Exhibit UUU was located by Hiss's investigators only after a great expenditure of time and effort. A number of witnesses were called by Hiss at the trial to testify to the machine's travels after Mrs. Hiss had given it away. According to them it first passed to the children of the Hisses' housekeeper, Claudia Catlett. Her son, Perry Catlett, trans-

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49 Its serial number was 230,099 which, Hiss claims, fixed the date of its manufacture as 1929, two years after that of the machine he and Mrs. Hiss had had.

50 It is appropriate again to note in this connection, that it was Hiss—who incorrectly paints himself as disadvantaged in his preparation—who found the Woodstock, notwithstanding his attribution to the FBI of "access to sources of information and resources beyond the wildest dreams of the defense." Nor does Hiss endeavor to explain how a typewriter with characteristics *identical* to those possessed by the Hiss machine could have been placed with the Catletts and their associates, there to be "found" by his investigators. *See* Judge Goddard's comments made in denying the motion for a new trial in *United States v. Hiss*, 107 F.Supp. 128, 134 (S.D.N.Y.1952), *aff'd*, 201 F.2d 372 (2d Cir.), *cert. denied*, 345 U.S. 942, 73 S.Ct. 830, 97 L.Ed. 1368 (1953).

ferred the machine to his sister, Burnetta, who in turn relinquished it to one Dr. Easter. Following Easter's death, his neighbor Vernon Marlow obtained the typewriter. Junkman Ira Lockey took the machine from Marlow and gave it to his daughter, one Mrs. McQueen, who later returned it to her father from whom defense attorney McLean purchased it. See n. 16 *supra*. In addition, Hiss and his wife *both* testified that the machine he placed in evidence had been their machine. And Hiss did not dispute on the trial that that very machine had typed not only the "standards" he had originally furnished the FBI but also all but one of the forty-four typewritten documents that Chambers had produced in Baltimore. *See* n. 11, *supra*.

Hiss's present contention in the face of all this proof of his own is that the FBI *knew* from its investigation that Exhibit UUU could not have been the machine that Mrs. Hiss had gotten from her father because the serial number established that the machine had been manufactured in 1929, and Fansler had purchased the machine in 1927. The prosecutor therefore had a duty to tell Hiss of this, he now contends.

There are two dispositive answers to this contention. The first is that the FBI reports of the investigation on this question are highly contradictory and far from conclusive. For example, while Thomas Grady, the Woodstock salesman who made the sale to Fansler, said he sold no typewriters after he quit his job at Woodstock in 1927, he remembered selling the machine to the Fansler agency during the time one Anne Coyle was employed by Fansler as a secretary. Anne Coyle, however, did not begin working for Fansler until the fall of 1928. Martin's impression, too, was that the Woodstock had been purchased *after* Anne Coyle had come to work. An earlier secretary, one Katherine Shotwell, recalled a Woodstock that might have been "traded in for a new one during twenty-seven or twenty-eight" according to an FBI interview. The proposed, but unsigned, affidavit of Joseph Schmitt, factory manager in charge of the Woodstock records, submitted as part of Hiss's motion for a new trial in 1952 similarly does not definitively establish 1929 as the date the typewriter, Exhibit UUU, was manufactured.

The affidavit had been prepared by Hiss's then-counsel and sent to Schmitt for signature. Schmitt returned it unsigned, later telling the FBI that "he drew no conclusion in last paragraph of exhibit. No records available re exact system of skipping serial numbers. . . . [N]o assurance this number is official [sic]."[51]

In any event, the second dispositive answer is that this issue is wholly peripheral to the matter that was on trial. While it appears likely that the prosecution did not wish to venture upon this sea of confusion with the jury, it is quite clear that such a venture was neither necessary nor required by considerations of fairness in view of Hiss's concession made long before trial that *regardless of the typewriter he had produced at trial, the same typewriter had typed both the "standards" and all but one of Chamber's Baltimore documents.* The conclusion is thus inescapable that while the evidence relating to the machine's origins is puzzling, and undoubtedly the product of confused memories, nevertheless, a Woodstock *had* come to the Hisses' home in the 1930's and *had* concededly typed both the Baltimore documents and the Hiss "standards". Consequently, any evidence as to its origins was irrelevant, and the prosecutor was under no duty to disclose to Hiss the multi-faceted gleanings of the government's investigation into this area.

Finally on this subject, I note that this entire issue was the subject of Hiss's 1952 motion for a new trial on virtually the same evidence and that this is therefore a relitigation by Hiss of a matter already decided adversely to him. Judge Goddard, in his opinion at that time, *United States v. Hiss,* 107 F.Supp. 128, 134 (S.D.N.Y.1952), *aff'd on opinion below,* 201 F.2d 372 (2d Cir.), *cert. denied,* 345 U.S. 942, 73 S.Ct. 830, 97 L.Ed. 1368 (1953), stated:

> The defense reasoning that No. 230,099 was manufactured after the Hiss machine is not sustained by any

51 It would seem axiomatic that in this context, if a defendant puts a typewriter in evidence and he and his wife state under oath that that was their typewriter, the prosecutor is entitled to accept this as so.

> proof. Their theory is based wholly upon incomplete records from which they have drawn speculations from approximate dates of manufacture. Some of their own witnesses cannot support their theory.

I also note that the 1952 motion for a new trial was predicated, in part, upon Hiss's hypothesis that Chambers had committed forgery by typewriter by constructing Woodstock 230,099 with the identical typeface characteristics as the Hiss machine—without access to the Hiss "standards" to guide him—and thereafter typing the "Baltimore documents" thereon to extricate himself from Hiss's libel action. As Judge Goddard pointed out, however:

> If this be so, it would mean that he [Chambers] constructed in three months a machine that has taken the defense's several experts at least one year to produce and that still falls short of being a perfect duplication. Moreover, there is not a trace of any evidence that Chambers had the mechanical skill, tools, equipment or material for such a difficult task. It is quite unlikely that Communist friends constructed it or provided the material, etc. for Chambers, as the defense suggests, because at that time his relationship with them was far from friendly. If Chambers had constructed a duplicate machine how would he have known where to plant it so that it would be found by Hiss? In planting a duplicate typewriter he would subject himself to the risk of the real Hiss machine being found and his entire case being destroyed.

THE PROSECUTION'S ALLEGED KNOWING USE OF PERJURED TESTIMONY FROM WITNESSES MURRAY AND ROULHAC

Hiss next contends that the prosecution knowingly used perjured testimony from government rebuttal witnesses Edith Murray and George Roulhac. These claims I find to be frivolous.[52]

52 I note that Hiss apparently made no effort to locate, interview, and get affidavits from either Murray or Roulhac—assuming they are still living—prior to leveling these serious charges.

Edith Murray, as mentioned earlier, *see* pp. 985-986, *supra*, worked as the Chamberses' maid in the latter part of 1935 and the spring of 1936. She testified that during this time period the Chamberses, whom she knew as the "Cantwells", had only two visitors. She identified them at the trial as Mr. and Mrs. Hiss. She knew Mrs. Hiss as Miss Priscilla. It does not appear that she knew Mr. Hiss by any name at the time. Based upon a signed statement that she gave to the FBI reciting, *inter alia*, that during her examination of photographs of Mr. and Mrs. Hiss she was told their names, Hiss now claims that she committed perjury when she testified that she was not told the names of the Hisses prior to coming to New York for the trial. Far from showing the government's knowing use of perjury, the facts demonstrate no more than a prior inconsistent statement by the witness.

Mrs. Murray, a domestic, in poor health, and not a newspaper reader was basically unaware of the Hiss controversy[53] until she was brought to New York for the trial. In these circumstances, it is hardly surprising that at trial she did not remember that the agents had mentioned the unfamiliar name "Hiss" at the time she viewed the photographs some three months earlier. Moreover, given her unfamiliarity with the case, mention of the name "Hiss" could have had no conceivable prejudicial or suggestive effect on her identification. While Hiss's counsel might have explored this on cross examination to attack her recollection, it hardly seems something that would have cast any serious doubt on the basic truthfulness of Mrs. Murray's testimony identifying the Hisses.[54]

Hiss next alleges that rebuttal witness George Roulhac committed two acts of perjury. Roulhac, then a sergeant in the

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53 Mrs. Murray had heard "something about some filling [sic] was found in a pumpkin on a farm in Westminster, but I still didn't pay any attention to that."

54 I note that although Hiss's counsel established on cross examination in customary fashion, *see* p. 989, *supra*, that Mrs. Murray had signed a statement, he made no request of the Court to inspect it for possible inconsistencies.

United States Air Corps stationed in Alaska, testified on January 16, 1950. He stated that the first time he had observed a typewriter like the Woodstock in the home of the Hisses' former maid, Claudia Catlett, was three months after January 17, 1938, the date he and the Catletts moved into a new residence at 2728 P Street. This testimony was obviously offered to rebut Hiss's claim that the typewriter had been given to Mrs. Catlett prior to 1938.

Hiss's first claim of perjury as to Roulhac is addressed to Roulhac's statement on cross examination that he, Roulhac, had only been present approximately three or four times in the United States Courthouse prior to trial. Hiss claims that Roulhac had in fact been there some twenty times. He bases this on a letter of December 13, 1949, addressed to the United States Marshal's office. That letter, over the prosecutor's signature, states, "With reference to . . . Sgt. George N. Roulhac, Jr., . . . and the payment to him of either witness fees or necessary subsistence, please be advised that . . . I, together with other Agents, saw the Sergeant daily [for the month of November]." Hiss's claim of perjury by Roulhac on this collateral issue flies in the face of common sense. Roulhac's testimony of four visits to the courthouse accords not only with what one would expect given the relatively straightforward and simple nature of his testimony, but the chief prosecutor, with the second trial commencing in mid-November, obviously had more pressing matters to occupy his time than to meet daily with Sergeant Roulhac. The prosecutor's letter, clearly for another purpose and, as far as the record reflects, never shown to Roulhac, does not therefore support the claim that the Government knowingly allowed perjured testimony by Roulhac at trial.

Hiss's second contention as to Roulhac is stated as follows:

> The change in Roulhac's testimony over the period of his contact with the FBI and prosecution reveals further perjury which was committed by this witness.

The answer to this claim is that there was no change in any "testimony". What does appear is that when Roulhac was first

interviewed by the FBI in Alaska as to a typewriter at the Catlett's eleven years earlier, Roulhac—for whom this could hardly have been a significant matter—did not recall seeing a typewriter after he first moved to P Street. He did recall seeing much later a "portable model in a black case." According to the FBI he was also at that time "very vague as to dates and events."

When later brought to New York and shown numerous documents, including photographs of apartments and the P Street lease with his name on it, his recollection was substantially refreshed, as one might expect, particularly as to the date of the move to P Street. Most significant of all, an FBI report reveals that upon being shown photographs of seven different typewriters, Roulhac "without hesitation" picked out the Woodstock as looking like the one the Catletts had received from the Hisses. Hiss's claim of "further perjury" by Roulhac, therefore, is utterly without support. It is, needless to say, entirely proper for a prosecutor—or any lawyer—to refresh a witness's recollection of events if the lawyer believes it to be faulty. There is no showing that anything more than that happened here.

THE PROSECUTION'S SUMMATION ON CERTAIN COMMON TYPING ERRORS

Hiss finally claims that the prosecutor improperly referred in his summation to certain common typing errors found in both the Baltimore exhibits and two of the Hiss standards. The challenged statement—eleven lines of the forty-nine page printed summation—is as follows:

> Now in connection with the documents I am going to give you two little thoughts to take with you. In going over the documents I noticed some common typing errors. When you get these documents inside, these Baltimore documents and the standards, you know the Mercy letter and the Timmy Hobson thing, look for similarity of mistakes, and I call to your attention the following combinations 'r' for 'i', 'f' for 'g', 'f' for 'd' and you will see them. You

> will see the same mistakes on the standards, on the Mercy Hospital letter and on the Timmy Hobson letter, the same characteristics as you do on the Baltimore exhibits.

Given Hiss's counsel's earlier suggestion to the jury in summation that Chambers or a confederate—and not one of the Hisses—typed the Baltimore documents on Hiss's machine *after* surreptitiously locating it at the maid's home, it was certainly appropriate for the prosecution to call to the jury's attention a small piece of evidence of some repetitious mental or muscular typing quirk supporting the conclusion that *whoever* had typed the two standards and the Baltimore exhibits,[55] they were all typed by one person with that quirk. *United States ex rel. Coleman v. Mancusi,* 423 F.2d 985, 987-8, (2d Cir.), *cert. denied,* 400 U.S. 842, 91 S.Ct. 84, 27 L.Ed.2d 77 (1970). In fact, the common typing errors flowing from two *different* standards had been called to the prosecutor's attention by one of the jurors at the first trial. As an FBI memorandum of July 21, 1949, reveals,

> These facts were [thereafter] pointed out to the Bureau [by the prosecutor] with the hope that possibly a sufficient number of these errors could be found in the known specimens and questioned documents that would enable someone to so testify. These examinations were made by the Laboratory and a report was submitted, indicating that it would be impossible for an expert to testify to the fact that because of the similar or common errors it followed that PRISCILLA HISS actually typed the questioned documents.

Hiss now faults the prosecutor for making the challenged remarks in view of the conclusion in this FBI laboratory

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55 Hiss's contention that the prosecutor was motivated by the awareness that the "*identity of the typist* [as Priscilla Hiss] was seen as vital to the prosecution" is wholly erroneous. Judge Goddard, who presided over the second trial, specifically found in denying the motion for a new trial in 1952 that Mrs. Hiss's role as the alleged typist was "not an essential element of the case against Hiss." *United States v. Hiss, supra,* 107 F.Supp. at 133.

report. However, the fact that an expert had not been willing to testify that the typist of all the documents was Priscilla Hiss does not mean that the conclusion implicit in the prosecutor's comment—that whatever his or her identity, the same person typed all the documents—was not valid, given the observable, unique typing errors common to the various documents.

Finally, even assuming *arguendo* that the prosecutor should not have referred to the common typing errors, his comments "do not possess the constitutional dimension necessary for review by this Court," *Klein v. Smith,* 383 F.Supp. 485, 487 (S.D.N.Y. 1974), *aff'd,* 559 F.2d 189 (2d Cir.), *cert. denied,* 434 U.S. 987, 98 S.Ct. 617, 54 L.Ed.2d 482 (1977), particularly where as here, they are raised by petition for a writ of *coram nobis.*

CONCLUSION

An analysis of Hiss's claim of an intrusion into the defense camp, reveals no prejudice to him. *Weatherford v. Bursey, supra.* Hiss's remaining claims must be viewed under the reasonable doubt standard. *United States v. Morgan, supra.* Whether these claims are considered singly or together, they raise no real question whatsoever, let alone a reasonable doubt, as to Hiss's guilt. The trial was a fair one by any standard, and I am presented with nothing requiring a hearing on any issue. The jury verdict rendered in 1950 was amply supported by evidence—the most damaging aspects of which were admitted by Hiss—and nothing presented in these papers, extensive though they are, places that verdict under any cloud. Accordingly, Hiss's petition for a writ of error *coram nobis* is dismissed.

So ordered.

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 82-6196

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of March, one thousand nine hundred and eighty-three.

ALGER HISS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Alger Hiss,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, *Clerk*

by /s/ FRANCIS X. GINDHART
Francis X. Gindhart,
Chief Deputy Clerk

ORDER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of February, One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. THOMAS J. MESKILL,

Circuit Judges.

ALGER HISS,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Alger Hiss appeals from a judgment of the United States District Court for the Southern District of New York (Richard Owen, J.) dismissing his petition for a writ of error *coram*

nobis for relief from a conviction of perjury, alleging several claims of prosecutorial misconduct. 28 U.S.C. § 1651(a) (1976).

We find the appeal to be completely without merit and affirm the judgment below substantially for the reasons stated in the thorough opinion of Judge Owen reported at 542 F.Supp. 973 (S.D.N.Y. 1982).

/s/ HON. WILLIAM H. TIMBERS
Hon. William H. Timbers

/s/ HON. ELLSWORTH A. VAN GRAAFEILAND
Hon. Ellsworth A. Van Graafeiland

/s/ HON. THOMAS J. MESKILL
Hon. Thomas J. Meskill

APPENDIX B

DIRECT EXAMINATION OF DR. CARL A. L. BINGER

(Trial Transcript p. 3650)

Q. What is your opinion, Dr. Binger, of the mental condition of Mr. Chambers?

A. I think Mr. Chambers is suffering from a condition known as psychopathic personality, which is a disorder of character, of which the outstanding features are behavior of what we call an amoral or an asocial and delinquent nature.

[3651] Q. Will you define for us, Doctor, what you mean by amoral and asocial? A. I mean that amoral behavior is behavior that does not take into account the ordinary accepted conventions of morality; and asocial behavior is behavior which has no regard for the good of society and of individuals, and is therefore frequently destructive of both.

Q. Is psychopathic personality a recognized mental disease? A. It is.

Q. Will you tell us what you mean when you say that psychopathic personality is a recognized mental disease?

A. I mean that it is listed as a standard diagnosis among the standard diagnoses accepted by the American Psychiatric Association, and can be found I think on page 601 - I am not certain of the page - of the American Hygiene Laws and General Orders of the Department of Mental Hygiene of the State of New York. You will find there the diagnosis of psychopathic personality among the diagnoses of mental illness.

Q. Is that a classification that has been put out by the Department of Mental Hygiene of the State of New York?

A. It is, yes, sir.

Q. And that Order has been effective for how long?

A. That I can't precisely say but I would guess at least 15 years.

[3652] Q. Aside from it being included in the classification under the Mental Hygiene Laws of the State of New York and

its Orders, is it recognized in the standard text books or texts on psychiatry? A. Oh, yes, there has been a great deal written about it both here and abroad, and there are many standard books that cover this subject.

Q. Will you tell us, Dr. Binger, what some of the symptoms of a psychopathic personality are? A. Well, they are quite variegated. They include stealing; they include acts of deception and misrepresentation; they include alcoholism and drug addiction; abnormal sexuality; agabondage; panhandling; inability to form stable attachments, and a tendency to make false accusations.

May I say that in addition to what is commonly recognized by the layman as lying, there is a peculiar kind of lying known as pathological lying, and a peculiar kind of tendency to make false accusations known as pathological accusations, which are frequently found in the psychopathic personality.

CROSS-EXAMINATION OF DR. CARL A. L. BINGER

(Trial Transcript p. 3760)

Q. Now, Doctor, when you started to describe the different symptoms of a person with a psychopathic personality you ran through 12 or so, and you said chronic, persistent and repetitive lying; stealing, deception; alcholism [sic] and drug addiction; abnormal sexuality; vagabondage; panhandling. For our purposes, Doctor, we can eliminate immediately three of those, can't we - drug addiction, alcholism [sic] and sexual abnormality? There is nothing in the hypothetical question that you have that even touches on any of those? A. That is right.

DIRECT EXAMINATION OF DR. HENRY A. MURRAY

(Trial Transcript p. 4064)

Q. What is your opinion of his mental condition?

A. In my opinion Mr. Chambers has been suffering from a mental ailment known as psychopathic personality without symptoms of psychosis or insanity.

If I could I would like to add a word at this point; that the word "personality" covers the whole structure of a person's mental being. It includes every kind of disorder of personality as well as different types of so-called normal personality.

(Trial Transcript p. 4068)

[4068] Q. Now I will ask the question which I asked you just before the noon recess, Dr. Murray: will you give us a definition of a psychopathic personality? A. A psychopathic personality is a disorder in the development of character the most striking objective sign of which is the repetition of a variety of asocial and delinquent, eccentric and hurtful actions.

Q. Is that a mental disorder? A. Yes, sir.

Q. Now, what kind of acts do you generally find in a person having a psychopathic personality? A. There are different types or kinds of psychopathic personalities: one is marked by lying, particularly that form known as pathological lying; by deceiving; by living a false life.

Another is marked by stealing, swindling, gambling.

Another, by violent aggressions; others by abnormal sexuality, drug addiction, alcoholism.

CROSS-EXAMINATION OF DR. HENRY A. MURRAY

(Trial Transcript p. 4176)

Q. And you have no evidence here, have you, Doctor, of drug addiction or alcoholism or sexual abnormality? We have ruled those out, haven't we? A. We have ruled out drug addiction and alcoholism.

Q. And not abnormal sexuality? A. I would not rule that out, Mr. Murphy.

[4177] Q. Well, let us find out what the facts are, Doctor. That is rather a serious thing. Tell us, Doctor, the facts that you have relied upon in these two things that I have called them, the hypothetical question and the writings, from which you rely on the diagnosis of not ruling it out. A. I have not included that in my list of evidences or list of symptoms, but I

could not exclude it on account of the poem "Tandaradei," which shows, I would say, fairly clearly to almost any reader an abnormal view or expression of sexuality, and on that account you could not rule it out.

Q. Well, let us see, Doctor, assuming you are right—and I want to go over that answer again—that would be one evidence or one symptom in all of the various things you got, is that right? A. I have not counted it, Mr. Murphy, I have not counted it because—

[4178] Q. You realize what a serious thing it is to say that, Doctor; that a person has a psychopathic personality of the abnormal sexuality type? Are you telling the jury that about this man you have never seen? A. I have said, I think twice, that I am not saying that.

Q. You just don't want to rule it out of all of the different types of personality because of a poem, is that right? A. I was saying that in my belief Mr. Chambers belongs to a mixed type with principal emphasis on lying, deceiving, stealing and certain other manifestations. That would make him a mixed type, I would not include abnormal sexuality because there is not enough evidence to put him in that class or even include it, and I have not mentioned it, but if you ask me whether I can absolutely rule it out I am not absolutely able to rule it out.

No. 82-2072

In the Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: ALGER HISS, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's failure to disclose inconclusive evidence casting doubt on the authenticity of an exhibit located, vouched for, and introduced into evidence by petitioner deprived petitioner of a fair trial.

2. Whether the government's receipt of information from a defense investigator abridged petitioner's Sixth Amendment right to counsel and deprived him of a fair trial.

3. Whether the government improperly withheld three prior statements by the prosecution's chief witness and thereby deprived petitioner of a fair trial.

4. Whether petitioner has made the factual showing necessary to warrant an evidentiary hearing on his claim that he was subjected to illegal electronic surveillance.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2072

IN RE: ALGER HISS, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-47a) is reported at 542 F. Supp. 973. The per curiam memorandum of the court of appeals (App., *infra,* 1a) is not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 1a) was entered on February 16, 1983. A petition for rehearing was denied on March 29, 1983 (Pet. App. 48a). The petition for a writ of certiorari was filed on June 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a two-month jury trial in the United States District Court for the Southern District of New York, petitioner was convicted in 1950 on two counts of perjury, in violation of 18 U.S.C. 1621.[1] The court of appeals

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[1]An earlier trial, in 1949, ended in a mistrial.

affirmed, *United States* v. *Hiss,* 185 F.2d 822 (2d Cir. 1950), cert. denied, 340 U.S. 948 (1951), and petitioner served three years of a five-year prison sentence. Two years after his conviction petitioner moved for a new trial, claiming newly discovered evidence. His motion was denied, *United States* v. *Hiss,* 107 F. Supp. 128 (S.D.N.Y. 1952), and the court of appeals affirmed, 201 F.2d 372 (2d Cir.), cert. denied, 345 U.S. 942 (1953). Beginning in March 1975, petitioner filed a number of requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, for access to government files concerning the events leading to his conviction. Based on documents provided by the government in response to these requests, petitioner sought a writ of error coram nobis asserting various claims of prosecutorial misconduct. The district court denied the petition and declined to hold an evidentiary hearing (Pet. App. 1a-47a). The court of appeals affirmed (App., *infra,* 1a).

The facts pertaining to petitioner's conviction and his various claims of error are set out in the district court's opinion and may be summarized as follows.[2]

1. In December 1948 petitioner testified before a federal grand jury in the Southern District of New York investigating allegations of espionage. It was alleged by a former functionary of the American Communist Party, Whittaker Chambers, that petitioner had provided him with copies or summaries of documents — principally from the State Department — for ultimate delivery to the Soviet Union. Petitioner testified that neither he nor his wife ever delivered such documents to Chambers. Petitioner also

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[2]The documentation underlying petitioner's claims is contained in a lengthy joint appendix filed with the court of appeals. References to this joint appendix are generally cited as "C.A. App." Specific references to the proceedings at petitioner's first trial and his second trial are cited as "*Hiss I*" and "*Hiss II*" followed by the appropriate page citations to the joint appendix.

testified that within three months of beginning work at the State Department he had ceased all contact with Chambers. (Certain deliveries to Chambers were alleged to have occurred after this time.) These two denials formed the basis for petitioner's indictment on two counts of perjury. (Pet. App. 1a-3a, 12a.)

The principal government witness at trial was Whittaker Chambers. Chambers had been introduced to petitioner in the summer of 1934 by J. Peters, the head of the American Communist Party underground, and Harold Ware, the leader of a secret Communist organization in Washington, D.C. At the time, petitioner was counsel to the Nye Committee, a Senate committee investigating the munitions industry. It was agreed that petitioner would be detached from Ware's organization and become part of a parallel organization being formed by Chambers.

Petitioner thereafter began providing Chambers with confidential State Department documents, which Chambers would photograph and return. In September 1936 petitioner began work at the State Department, where he became an assistant to Assistant Secretary Francis Sayre. While in that position petitioner would regularly, every week to ten days, remove important State Department documents and bring them home for delivery to Chambers. Chambers would take the documents to Baltimore, photograph them, and return them to petitioner the same night, permitting petitioner to replace the documents in the State Department files the next morning.

In mid-1937 a new procedure was adopted. Petitioner began removing documents on a daily basis. They were then retyped — either verbatim or in summary form — and returned to the State Department. Approximately every ten days Chambers would pick up the retyped documents along with petitioner's handwritten notes regarding other documents he had been unable to remove from the State

Department. Chambers would then photograph the materials and turn the film over to a Colonel Bykov, a Soviet spy. This procedure continued until April of 1938, when Chambers broke with the Communist Party. (Pet. App. 15a-16a.)

Between 1939 and 1946, Chambers' concern about the threat of Communism prompted him to alert various officials about Communist infiltration of the government. In the course of these conversations Chambers stated that petitioner was a Communist. In 1946 petitioner became aware that these charges were circulating, and during the next two years he learned that their source was Chambers — then a senior editor for *Time* magazine. On August 3, 1948, Chambers appeared before the House Special Subcommittee of the Committee on Un-American Activities ("HUAC") and testified that petitioner was a member of the underground apparatus of the American Communist Party. Petitioner appeared before the committee two days later and denied any Communist affiliation, denied knowing anyone named Whittaker Chambers, and was unable to recognize a recent photograph of Chambers. In subsequent testimony petitioner admitted knowing a man — possibly Chambers — who used the name George Crosley. According to petitioner, Crosley was a free-lance writer whom he had known in 1934 and 1935. Crosley had stayed several days at petitioner's home, had sublet petitioner's apartment, and had been given the use of petitioner's car. On one occasion Crosley accompanied petitioner when petitioner drove from Washington, D.C. to New York City. At an August 17, 1948 HUAC hearing petitioner, in accordance with his request, confronted Chambers and identified him as Crosley. (Pet. App. 4a-12a.)

Following the confrontation at the HUAC hearing petitioner demanded that Chambers repeat his accusation in a non-privileged forum, so that petitioner could sue him for defamation. Chambers did so in a television appearance on *Meet the Press,* and petitioner sued him for libel in the United States District Court in Baltimore, Maryland. Until this time Chambers had never revealed petitioner's involvement in espionage and had disclaimed the existence of any documentary evidence of petitioner's Communist Party activities. During discovery proceedings in the Baltimore libel action, however, Chambers produced a set of documents ("the Baltimore documents") that directly implicated petitioner in espionage activities.[3] The Baltimore documents comprised 65 pages of typewritten copies (verbatim or summaries) of War Department and State Department documents of some consequence from early 1938. Also included in the Baltimore documents were four notes, in petitioner's handwriting, summarizing State Department documents (Pet. App. 12a-13a).[4] Chambers had retained these documents — provided to him by petitioner during the final months of their espionage relationship — and after his break with the Communist Party in April 1938 had given them to a relative for safe keeping.

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[3]Explaining his prior concealment of espionage activities, Chambers said that he had hoped to cripple Communist infiltration in the government simply by exposing its existence, without uncovering the depth of disloyalty attendant upon espionage — in Chambers' words "the ultimate perfidy." *Hiss II,* C.A. App. 3347-3348.

[4]Chambers later turned over to HUAC five rolls of film, used to photograph certain State Department documents pertaining to proposed German-American trade agreements and three cables relating to China. The cables were initialed by petitioner (Pet. App. 13a n.12). (For a time Chambers had hidden the film in a pumpkin on his Maryland farm.)

The Baltimore documents provided powerful corroboration of Chambers' allegations. Petitioner conceded that the four handwritten documents were in his handwriting and that they summarized State Department documents to which he had had access. Petitioner claimed that they were drafts that he had prepared for his supervisor and later discarded while at work, and that someone else must have stolen them from the trash and given them to Chambers. But security procedures at the State Department made such a scenario unlikely, and petitioner's superior, Assistant Secretary Sayre, testified that the handwritten Baltimore documents were markedly dissimilar from handwritten notes that petitioner had prepared for him in the normal course of his duties (Pet. App. 19a n.23).

The 65 pages of typewritten Baltimore documents were also independently and directly linked to petitioner. The typewriting characteristics of the Baltimore documents were compared with four documents (the "Hiss standards") that had concededly been typed on a Woodstock typewriter once owned by petitioner. This comparison showed that all but one of the Baltimore documents had been typed on the same typewriter as the four Hiss standards. At trial petitioner did not contest that the Baltimore documents had been prepared on his typewriter; instead he claimed that the typewriter had been given away at the end of 1937, prior to the earliest date of any of the Baltimore documents. Petitioner suggested that Chambers or a confederate had gained access to the typewriter after it was given away and had used it to prepare the Baltimore documents in a way that would incriminate petitioner. (Pet. App. 12a-14a & nn.11, 13, 14; *id.* at 18a-19a & n.21.)

Chambers' version of the events was corroborated in several other significant respects. Julian Wadleigh, another State Department official who had passed documents to

Chambers, confirmed Chambers' role in the Soviet espionage apparatus (Pet. App. 16a n.18). The evidence also showed that in late 1936 Chambers had given petitioner an oriental rug. Petitioner claimed that it was a gift to compensate him for the rent Chambers had not payed when he sublet petitioner's apartment. Chambers testified that he had given the rug to petitioner at the direction of Colonel Bykov, his Soviet contact, as a "gift from the Soviet people in recognition of the work of the American Communists" (Pet. App. 19a-20a). Wadleigh testified that he too had received an oriental rug from his Soviet contact in late 1936 (*ibid.*). Chambers also testified that in November 1937 he had borrowed $400 from petitioner in order to purchase a car. (Petitioner had testified before the grand jury that he had had no contact with Chambers after January 1937.) Chambers' recollection of the amount and date of the loan was confirmed by petitioner's bank records and the records of the car dealership (*ibid.*).

2. Two years after his conviction petitioner sought a new trial on the basis of newly discovered evidence regarding the Woodstock typewriter introduced at trial as Defense Exhibit UUU.

At trial the evidence that had definitively linked petitioner to the typed Baltimore documents was an expert comparison of the typewriting characteristics of four documents that had concededly been typed by petitioner's wife on a typewriter once owned by the Hisses. This expert opinion was initially rendered without access to the typewriter, and its accuracy was not disputed at trial (Pet. App. 12a n.11, 18a-19a & n.22). Nevertheless, the typewriter was considered a potentially significant piece of evidence, and intense efforts were made to locate it. The search for the typewriter — given away ten years earlier — entailed tracking its course through a half dozen subsequent possessors until it was located and purchased by petitioner's lawyers at

a junk shop. At trial, its ten-year chain of custody was established, petitioner and his wife identified it as their typewriter, and it was introduced in evidence as Defense Exhibit UUU (Pet. App. 39a-40a). As noted above, petitioner's defense at trial was that he had given the typewriter away before any of the Baltimore documents were prepared. Petitioner theorized that Chambers had thereafter gained access to the typewriter and used it to prepare the incriminating documents.

In his motion for a new trial petitioner presented an even more strained scenario. He argued that Chambers had fabricated a typewriter capable of reproducing the characteristics of the Hisses' typewriter, had used the fabricated typewriter to prepare the Baltimore documents, and had then placed the fabricated typewriter where it would be discovered by petitioner's attorneys and introduced in evidence. Although various defense experts touted the feasibility of such a fabrication, a year's worth of expert endeavors failed to produce a fabricated typewriter capable of generating typing characteristics not distinguishable by an expert from the typescript of the Hiss standards and the Baltimore documents. The trial court dismissed this "forgery by typewriter" argument (Pet. App. 42a) as unsupported by any proof. *United States* v. *Hiss, supra,* 107 F. Supp. at 130-134.

More pertinent to petitioner's present claims is the evidence advanced on the new trial motion concerning the origins of his typewriter. The typewriter — a Woodstock model — had first been purchased by petitioner's father-in-law, Thomas Fansler, for use in his insurance partnership. In his motion for a new trial petitioner contended that Defense Exhibit UUU, which bore the serial No. 230,099, had not been manufactured by the Woodstock company until late July or early August of 1929. But typewriter

samples from the correspondence of the insurance partnership showed that a new Woodstock typewriter had been used there as early as July 8, 1929. This proved, according to petitioner, that Woodstock typewriter No. 230,099 (Defense Exhibit UUU) was not the Woodstock typewriter later given by Fansler to the Hisses. Therefore it must have been fabricated by Chambers. The trial court found, however, that the Woodstock company documents relied upon by petitioner were too incomplete and unreliable to establish that typewriter No. 230,099 had been manufactured later than July 8, 1929. *United States* v. *Hiss, supra,* 107 F. Supp. at 133-134. Indeed, petitioner's own evidence indicated that No. 230,099 could have been manufactured as early as April 1929 (*id.* at 133).

3. Since 1975 petitioner has uncovered through the Freedom of Information Act additional historical details pertaining to his prosecution. Petitioner relies on these materials in support of his petition for a writ of error coram nobis.

a. Petitioner's first claim relates to the dispute over the authenticity of Defense Exhibit UUU — the same issue litigated in petitioner's motion for a new trial.

Through the FOIA petitioner has now gained access to the raw file of the FBI's investigation into the origins of Woodstock typewriter No. 230,099. It is undisputed that FBI document experts compared typing samples from that typewriter with the Baltimore documents and the Hiss standards, and concluded that all three sets of documents had been typed on the same machine.[5] They found, in short, that Woodstock typewriter No. 230,099 (Defense Exhibit

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[5]During the period between petitioner's first and second trials the FBI, pursuant to court order, was permitted to take samples from Defense Exhibit UUU (Pet. App. 19a n.22).

UUU) had belonged to the Hisses and had been used as an instrument of espionage. The raw data regarding the origins of the typewriter were less conclusive, since the recollection of witnesses regarding events 20 earlier was unclear. For example, the seller, Woodstock agent Thomas Grady, and the buyer, Fansler's partner Harry Martin, said the partnership had bought the Woodstock typewriter in 1927. Yet both Grady and Martin associated the purchase with a time when Ann Coyle worked for the partnership as a secretary, and Coyle was not hired until the fall of 1928 (Pet. App. 40a). Other FBI interviews raised the possibility that the Fansler-Martin partnership had bought a Woodstock typewriter in 1927 and had later traded it in for a new typewriter (C.A. App. 315-316, 325). This scenario would have been consistent with evidence — presented by petitioner in his new trial motion — that the Fansler-Martin partnership had replaced an older Woodstock typewriter with a new one in early July 1929.

b. Petitioner has also learned through FOIA requests that on two occasions a former defense investigator, Horace Schmahl, provided the government with information regarding matters that were the subject of inquiry by defense counsel.[6] On March 22, 1949 (after petitioner's indictment and before his first trial) Schmahl advised the FBI that he had been asked to investigate an allegation that Mrs. Chambers had used a false name in making a credit application. (Schmahl had discussed the same assignment with the FBI prior to the indictment, and about the time of the indictment had given the FBI a credit bureau report—a

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[6]Petitioner's suggestion of additional unauthorized contacts by Schmahl was rejected by the district court as mere speculation (Pet. App. 24a n.27).

document the FBI already had (C.A. App. 699)).[7] The second contact occurred during the first trial, when Schmahl—no longer working for the defense— advised the prosecutor that at one time the defense had contacted a typewriter firm in an effort to locate an old Woodstock typewriter. Both of these contacts by Schmahl were unsolicited. (Pet. App. 23a-25a.)

c. Petitioner has also learned through the FOIA of three statements by Whittaker Chambers that were not provided during discovery at trial. One, a March 1946 FBI report, summarized an interview in which Chambers made several assertions inconsistent with his trial testimony. Chambers stated that he broke with the Communist Party in 1937, but later testified that this occurred in April 1938. Chambers also stated that he had no documentary proof of petitioner's Communist Party affiliation, though he later produced the Baltimore documents establishing petitioner's espionage activities on behalf of the Soviet Union.

The second statement, a February 1949 handwritten note by Chambers, suggested that it would be prudent to anticipate that petitioner's defense would press the charge that Chambers was a homosexual. Evidence of Chambers' homosexuality, according to petitioner, would have bolstered the defense theory that Chambers was a "psychopathic personality" — a mental disorder whose pathology included persistent lying, acts of deception, drug addiction, alchoholism, and sexual abnormality (Pet. 26).

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[7]Schmahl had numerous contacts with the FBI prior to the indictment. These contacts were authorized and encouraged by petitioner's attorneys, who were endeavoring to cooperate completely with the government in the hope of avoiding indictment (Pet. App. 14a, 24a & n.28).

The third statement dates from mid-April of 1949. During the preceding three and a half months FBI agents had conducted numerous interviews of Chambers and had collated their results into a 184-page first-person narrative.[8] From this lengthy recital petitioner has extracted one inconsistent statement: Chambers said that his car loan from petitioner was $500, rather than $400 as he testified at trial.

ARGUMENT

1. Petitioner first contends (Pet. 11-16) that the government improperly withheld evidence that Defense Exhibit UUU — which both petitioner and his wife testified was their typewriter (Pet. App. 40a) — was not the machine purchased by the Fansler-Martin partnership. This prosecutorial misconduct, petitioner claims, prevented him from receiving a fair trial. This claim is frivolous.

In the first place, as the court of appeals noted (Pet. App. 41a n.51), "[i]t would seem axiomatic that * * * if a defendant puts a typewriter in evidence and he and his wife state under oath that that was their typewriter, the prosecutor is entitled to accept this as so." This is particularly true when the government's document experts (as well as the defendant's; see Pet. App. 12a n.11) concluded that that very machine had been used to type not only the Baltimore documents, but also the Hiss standards. It can hardly be considered improper for the government under those circumstances to have ignored conflicting hearsay statements

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[8]Chambers may have reviewed the narrative but never signed it — apparently because doing so could have markedly altered its discoverability under then existing law (Pet. App. 30a).

based on recollections two decades old about when the typewriter was purchased by its prior owner.[9]

More important, the history of Woodstock typewriter No. 230,099 up to the time the Hisses owned it in the early 1930's had no bearing on either the government's or the defendant's theory of the case. For the government's part, unchallenged expert testimony at trial established that the same typewriter used by Mrs. Hiss in the early thirties had been used to type the Baltimore documents in early 1938. And petitioner claimed only that that same typewriter had passed out of his possession in late 1937, prior to the creation of the Baltimore documents. Petitioner did not advance at trial the implausible theory — first proposed in his motion for a new trial — that Chambers had somehow fabricated a typewriter identical to the one he had owned, had used it to type the Baltimore documents, and had then planted it so that it would be discovered by investigators for the defendant.[10] Thus, how the Hisses came to possess

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[9]After 30 years of hindsight the weight of the evidence continues to support the proposition that Woodstock typewriter No. 230,099 was the machine that passed from the Fansler-Martin partnership to the Hisses in the early 1930's. Expert testimony presented by petitioner on his new trial motion established that a Woodstock typewriter at the Fansler-Martin partnership had been replaced with a new Woodstock typewriter in early July 1929 — a date within the approximate time frame for the manufacture of Woodstock typewriter No. 230,099. *United States* v. *Hiss, supra,* 107 F. Supp. 133-134. This evidence is consistent with information in the FBI reports indicating that the partnership purchased a Woodstock typewriter which was later traded in (Pet. App. 40a). Furthermore, petitioner has failed to provide an alternative scenario — sinister or otherwise — that would explain how he found Woodstock typewriter No. 230,099 at the end of a chain of custody beginning in his home (Pet. App. 39a-40a). Finally, as we have noted, samples taken from Defense Exhibit UUU established that it was used to type both the Hiss standards and the Baltimore documents.

[10]Indeed, petitioner even now does not reiterate the "forgery by typewriter" theory, but contents himself with the argument that the undisclosed information would have presented "endless opportunities

Woodstock typewriter No. 230,099 was, quite simply, irrelevant (Pet. App. 41a).[11] See *United States* v. *Agurs*, 427 U.S. 97, 112 (1976) (undisclosed evidence must create a reasonable doubt that did not otherwise exist).

In any event it appears that petitioner already *had* much of the information he claims only recently came to light from the government's files.[12] Petitioner conceded in the court of appeals that defense files contained information regarding the manufacturing dates of Woodstock typewriters (Br. for Petitioner-Appellant 24 n.27). And he was also aware of Martin's belief that the Fansler-Martin typewriter had been bought in 1928 (C.A. App. 291). It is clear that petitioner, whose investigators succeeded in tracing the

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for cross-examination of the government" (Pet. 15). That claim is difficult to take seriously, given that petitioner conceded long before trial that the same typewriter had typed both the standards and the Baltimore documents (Pet. App. 41a), that petitioner and his wife both testified that typewriter No. 230,099 was theirs, and that petitioner's experts agreed with the government's that Exhibit UUU had typed both sets of documents.

[11]Petitioner endeavors (Pet. 11, 15) to establish the government's reliance on Defense Exhibit UUU by pointing to two government witnesses who testified regarding the typewriter. These witnesses, however, were not called to vouch for Defense Exhibit UUU — the Hisses had already done that. Both witnesses were called in rebuttal to counter specific assertions made in the defense case. FBI Agent John McCool demonstrated that the typewriter was in working condition — thus undercutting Mrs. Hiss's testimony that it had been given away because it was "pretty much of a wreck." *Hiss II*, C.A. App. 4403; see *Hiss II*, C.A. App. 4574 (prosecution summation). George Roulhac testified that he first saw the typewriter at the Catletts' in mid-April 1938 — thus undercutting the defense's assertion that the typewriter had been given to the Catletts in late 1937. *Hiss II*, C.A. App. 4494; see *Hiss II*, C.A. App. 4573 (prosecution summation).

[12]This conclusion is supported by Professor Weinstein's review of the defense files, which disclosed that at the time of trial the defense already had most of the Martin-Grady information from its own investigations. A. Weinstein, *Perjury: The Hiss-Chambers Case* 561 (1978).

Hisses' typewriter, had the resources to pursue this information had it been relevant to his defense. That he chose not to do so is no basis for now complaining that similar information was not disclosed by the government. See *United States* v. *LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982), cert. denied, No. 82-5571 (Jan. 24, 1983); *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980).[13]

Finally, petitioner has already made an unsuccessful motion for a new trial based on "virtually the same evidence" he now relies on (Pet. App. 41a). And the district court, in denying that motion, stated:

> The defense reasoning that No. 230,099 was manufactured after the Hiss machine is not sustained by any proof. Their theory is based wholly upon incomplete records from which they have drawn speculations from approximate dates of manufacture. Some of their own witnesses cannot support their theory.

United States v. *Hiss, supra*, 107 F. Supp. at 134.

2. Petitioner also contends (Pet. 16-20) that the government's receipt of information from a former defense investigator abridged his Sixth Amendment right to counsel and deprived him of a fair trial. This claim is without merit.

The government did not instigate either of the contacts by Schmahl that are the subject of petitioner's present complaint. Nor did the government derive any tangible benefit

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[13]It is also worth emphasizing that this Court did not hold until a quarter century after petitioner's conviction that a prosecutor is constitutionally required to disclose exculpatory evidence despite the fact that the defendant made no request for it. *United States* v. *Agurs, supra*, 427 U.S. at 106-107. Petitioner made no request for government information regarding the origins of Defense Exhibit UUU.

from the information he provided (Pet. App. 25a).[14] It is well settled that there can be no violation of the Sixth Amendment right to counsel unless there is a realistic possibility of injury to the defendant or benefit to the prosecution. *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977). Some adverse consequence to the representation received by the defendant or the fairness of the trial proceedings must be shown. *United States* v. *Morrison*, 449 U.S. 361, 363-364 (1981).

Petitioner has failed to make even a semblance of such a showing. Not only was the information Schmahl supplied of little use, but his contacts both occurred in connection with petitioner's first trial. Even if it were assumed that Schmahl's actions had caused palpable prejudice at that trial, the remedy sanctioned by this Court would have been a new trial. See *Hoffa* v. *United States*, 385 U.S. 293, 307 (1966); *Caldwell* v. *United States*, 205 F.2d 879, 881 (D.C. Cir. 1953), cert. denied, 349 U.S. 930 (1955); *Coplon* v. *United States*, 191 F.2d 749, 759 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952). Petitioner in fact had a second trial (see note 1, *supra*), and as of that proceeding the value of Schmahl's information had been reduced to a nullity. Under such circumstances there is no basis for petitioner's claim that he was denied a fair trial.[15] *United States* v.

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[14]At his first trial petitioner himself disclosed the rental of a Woodstock typewriter — the information provided by Schmahl — as soon as the subject came up. *Hiss I*, C.A. App. 2767-2768. The question of Mrs. Chambers' credit application, also aired at the first trial (*id.* at 2385-2387), was not only insignificant, but as we noted above (page 10), the substance of that information had been communicated to the FBI before the indictment.

[15]Petitioner also complains (Pet. 18-19) that the FBI interviewed two document experts retained by defense counsel in connection with his motion for a new trial. These post-trial contacts had no impact on the fairness of the earlier trial proceedings. Moreover, a defendant can have no legitimate expectation that an expert, like other witnesses, will not also be contacted and interviewed by the government. *United States* v. *Andreadis*, 234 F. Supp. 341, 345 (E.D.N.Y. 1964).

Morrison, supra, 449 U.S. at 366. Cf. *Smith* v. *Phillips,* 455 U.S. 209, 219 (1982).

Aware of his inability to show any prejudice, petitioner seeks (Pet. 19) to invoke a per se rule of reversal for any governmental incursion into the defense camp that results in the transfer of some information to the government. *United States* v. *Levy,* 577 F.2d 200 (3d Cir. 1978).[16] But in *Morrison* this Court disapproved the Third Circuit's application of this per se rule, and made clear that an extreme remedy for any Sixth Amendment violation must be predicated upon some adverse impact on the fairness of the defendant's trial. *United States* v. *Morrison, supra,* 449 U.S. at 367. The lack of any discernable impact with regard to the fairness of petitioner's second trial precludes any deviation in petitioner's case from the holding in *Morrison.*[17]

3. Petitioner finally contends (Pet. 20-27) that the government's failure to produce three prior statements by Whittaker Chambers deprived him of a fair trial. There is no merit to this claim.

As the district court correctly found (Pet. App. 26a n.32, 29a), petitioner's various requests for prior statements by Chambers were limited to any such statements made prior to August 3, 1948 — the date of Chambers's first public appearance before HUAC. The choice of this cutoff date

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[16]In *Levy* the communication to the government involved actual defense strategy.

[17]Some cases prior to *Morrison* had applied a per se rule to particularly egregious governmental intrusions — misconduct that was "manifestly and avowedly corrupt," *United States* v. *Gartner,* 518 F.2d 633, 637 (2d Cir.), cert. denied, 423 U.S. 915 (1975); or "ruthless beyond justification," *United States* v. *Rosner,* 485 F.2d 1213, 1227 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). Even if the rule of those cases survives *Morrison,* the government's receipt of unsolicited and innocuous information on two occasions from someone not working with the prosecution hardly meets those criteria.

was understandable. Petitioner already had Chambers' extensive HUAC testimony from the summer of 1948, his testimony in the Baltimore libel action, and his grand jury testimony. The decision to seek out inconsistencies through access to statements made before these formal appearances was not capricious (Pet. App. 29a).

Only one of the three statements now at issue was made before August 3, 1948—a March, 1946 FBI report by one agent summarizing another agent's interview of Chambers. There is no evidence that the report was signed or adopted—or even seen—by Chambers, and its discoverability is thus far from apparent.[18] Petitioner suggests (Pet. 23) that a reason for its production may be found in cases foreshadowing *Brady* v. *Maryland*, 373 U.S. 83 (1963). But as this Court made clear in *United States* v. *Agurs, supra*, 427 U.S. at 112, there must be a reasonable likelihood that undisclosed evidence could have affected the outcome of the trial before a conviction will be overturned under *Brady*.[19] And the only useful item of information petitioner can point to in the 1946 FBI report (Chambers' disclaimer

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[18]Petitioner's trial long antedated both this Court's decision in *Jencks* v. *United States*, 353 U.S. 657 (1957), and the Jencks Act, 18 U.S.C. 3500. As noted by the district court (Pet. App. 28a), at the time of petitioner's trial a defendant seeking production of witness statements was first required to establish that the witness had given a signed statement and that the statement contradicted his trial testimony. The statement would then be subject to in camera review to determine the extent to which it should be disclosed. Not only was the 1946 FBI report unsigned (and so not producible under then applicable law), but it is doubtful that the report would be discoverable as Jencks Act material even today. *Goldberg* v. *United States*, 425 U.S. 94, 110 n.19 (1976); *United States* v. *Traylor*, 656 F.2d 1326, 1336 (9th Cir. 1981).

[19]Petitioner is clearly incorrect in arguing (Pet. 24) that a verdict may be overturned whenever undisclosed evidence *might* have affected the outcome of the trial. *United States* v. *Agurs, supra*, 427 U.S. at 108-109. See also *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 7-14.

that he had any documentary evidence to show that petitioner was a Communist[20]) was similar to other early statements made by Chambers. These alternative sources were fully utilized by petitioner's counsel in cross-examining Chambers. *Hiss II,* C.A. App. 3388-3400, 3414-3415. No prejudice can arise from the government's failure to disclose cumulative impeachment evidence. *United States* v. *Myers,* 692 F.2d 823, 846-847 (2d Cir. 1982), cert. denied, No. 82-1183 (May 31, 1983); *Ostrer* v. *United States,* 577 F.2d 782, 787 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

Chambers' two statements from 1949, unlike the 1946 statement, were made after the 1948 cutoff fixed by petitioner's discovery request. Thus any prejudice that may arise from their unavailability at trial must be measured against the stricter level of materiality laid down in *Agurs*: the undisclosed evidence must create a reasonable doubt that did not otherwise exist. *United States* v. *Agurs, supra,* 427 U.S. at 112. No such doubt arises from the 1949 statements.

The only impeachment material in the February 1949 handwritten statement concerned Chambers's homosexuality. Even if one makes the unlikely assumption that homosexuality would be a proper basis for cross-examination,[21] petitioner was fully armed with his own evidence of

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[20]Petitioner asserts that in his 1946 statement Chambers "went out of his way to clear Hiss" (Pet. 26). As demonstrated by the district court (Pet. App. 33a n.39), this claim is clearly false.

[21]As the district court noted (Pet. App. 36a), it is most unlikely that evidence of homosexuality could have been used to attack Chambers' character directly. See *United States* v. *Nuccio,* 373 F.2d 168, 171 (2d Cir.), cert. denied, 387 U.S. 906 (1967); *United States* v. *Provoo,* 215 F.2d 531, 536-537 (2d Cir. 1954). Nor would the relevance of such evidence be materially enhanced by its presentation in conjunction with an attack on Chambers as a "psychopathic personality" (Pet. 26). See Pet. App. 36a n.44.

Chambers' homosexuality and chose not to pursue the issue at trial (Pet. App. 34a nn.40, 42).[22] He cannot complain that the same information was not also given to him from government files. *United States* v. *LeRoy, supra,* 687 F.2d at 619; *United States* v. *Brown, supra,* 628 F.2d at 473.

Nor does petitioner have any complaint based upon the single inconsistency he has gleaned from Chambers' 184-page April, 1949 statement. Chambers' statement that petitioner had loaned him $500, rather than $400, to buy a car is an inconsistency aptly characterized by the district court as "minor in the extreme" (Pet. App. 30a). The $400 amount was corroborated at trial, and petitioner cannot seriously contend that an earlier discrepency of $100 in Chambers' recollection would have created a reasonable doubt that did not otherwise exist. *United States* v. *Agurs, supra,* 427 U.S. at 112.

4. Petitioner also claims (Pet. 28-29) that he is entitled to an evidentiary hearing because he was subjected to improper electronic surveillance, the records of which have allegedly been destroyed.[23] But petitioner's counsel specifically

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[22]Petitioner's decision not to pursue the issue of Chambers' homosexuality has been attributed to his concern that raising the issue might have led to speculation of a homosexual relationship between Chambers and petitioner's stepson, who had been discharged from the Navy due to a homosexual relationship (Pet. App. 34a-35a n.42). See Marbury, *The Hiss-Chambers Suit,* 41 Md. L. Rev. 75, 91-92 (1981); Weinstein, *supra* note 12, at 270, 377-380, 382-384, 395, 582-584.

Petitioner asserts (Pet. 26) that the prosecutor's cross-examination of Drs. Binger and Murray was disingenuous in stating (Pet. App. 37a) that there was "no evidence * * * of * * * sexual abnormality" with respect to Chambers. The district court found this assertion improper, but harmless (Pet. App. 37a). We note, however, that it accurately stated the evidence petitioner offered at trial.

[23]See *United States* v. *Coplon,* 185 F.2d 629, 637 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1953) (some wiretap records in the New York office of the FBI were destroyed during this period).

conceded in the district court that he had no evidence of such wiretapping. C.A. App. 4617, 4658.[24] The district court found this concession dispositive of petitioner's electronic surveillance claim (Pet. App. 4a n.1). Petitioner cannot persist in this claim armed with no more than the bare hope of what he might find through future discovery.[25]. Cf. *Contemporary Mission, Inc.* v. *United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981). We note, in any event, that even if such wiretapping occurred petitioner would face substantial difficulty in establishing its illegality[26] and its

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[24]The FBI conducted electronic surveillance of petitioner at his Washington, D.C. residence from December 1945 to September 1947, when he moved to New York. This wiretap was authorized by the Attorney General in order to investigate alleged espionage activities. Petitioner's present complaint alleges that this electronic surveillance continued after he moved to New York. We are informed that all known records of electronic surveillance of petitioner have been released to him.

[25]Petitioner's FOIA litigation seeking further data regarding the New York files of the FBI is pending before the same district judge who dismissed his petition for a writ of error coram nobis. *Hiss* v. *Department of Justice*, 76 Civ. 4672 (S.D.N.Y.) (Owen, J.).

[26]Warrantless electronic surveillance authorized by the Attorney General for the purpose of investigating espionage activities has been held lawful. *United States* v. *Buck*, 548 F.2d 871, 875-876 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). See also *Katz* v. *United States*, 389 U.S. 347, 363-364 (1967) (White, J., concurring). Given petitioner's position in the State Department and Chambers' identification of him as a devoted Communist sympathizer, the institution of warrantless electronic surveillance of petitioner would likely have met the criterion of reasonableness. *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 916 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982); *Halperin* v. *Kissinger*, 606 F.2d 1192, 1204-1206 (D.C. Cir. 1979), aff'd by an equally divided court, 452 U.S. 713 (1981).

effect on trial proceedings concerning events ten years earlier. *Alderman* v. *United States,* 394 U.S. 165, 183 (1969) (the defendant bears the burden of proving that a substantial portion of the case against him was tainted). Moreover, since petitioner's wiretapping casts no doubt on the accuracy of the jury's verdict, it provides no basis for collateral relief from his conviction, especially in a coram nobis proceeding thirty years after final judgment. The district court plainly did not abuse its discretion in declining to permit petitioner to pursue this tenuous claim. *United States* v. *Balistrieri,* 606 F.2d 216, 221 (7th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

5. In any application for coram nobis relief it is presumed that the earlier trial proceedings were correct, and the burden rests on the accused to show otherwise. *United States* v. *Morgan,* 346 U.S. 502, 512 (1954); cf. *Johnson* v. *Zerbst,* 304 U.S. 458, 468 (1938). This burden is particularly heavy where, as here, the "virtual impossibility" of retrial (Pet. App. 23a) would transform the issuance of a writ of error coram nobis into "the practical equivalent of an acquittal." *United States* v. *Keogh,* 440 F.2d 737, 741 (2d Cir.), cert. denied, 404 U.S. 941 (1971). Moreover, as a means of collaterally attacking a conviction, coram nobis relief is available only to correct errors " 'of the most fundamental character, that is, such as rendered the [earlier] proceeding itself irregular and invalid.' " *United States* v. *Addonizio,* 442 U.S. 178, 186 (1979), quoting *United States* v. *Mayer,* 235 U.S. 55, 69 (1914). None of petitioner's factual allegations approaches such a level of fundamental unfairness. Even judged by the less stringent standards applicable on direct review — the materiality requirements articulated in *Agurs* — none of petitioner's claims would entitle him to relief. The district court found that the new information regarding the Woodstock typewriter was "wholly peripheral" and "irrelevant" (Pet. App. 41a); that

information provided by Schmahl to the government could not have had the "slightest impact" on petitioner's conviction at his second trial (*id.* at 25a); and that failure to produce three of Chambers' numerous prior statements could not have prejudiced petitioner (*id.* at 26a-38a). Because the record before the district court conclusively demonstrated that petitioner was not entitled to any relief on the basis of these claims, the court was not required to hold an evidentiary hearing. *United States* v. *Tribote*, 297 F.2d 598, 600 (2d Cir. 1961); see *Machibroda* v. *United States*, 368 U.S. 487, 495 (1962). Petitioner has simply failed to raise any issue of "material fact on a claim of constitutional dimensions." *United States* v. *Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969).

Finally, we cannot overlook petitioner's failure to contest (Pet. 29) the substantial trial evidence establishing his guilt. Petitioner would have this Court isolate that issue from any consideration of the fairness of his trial. While such a course may be appropriate in the case of clearly outrageous government conduct, see *Rochin* v. *California*, 342 U.S. 165 (1952), the facts relied on by petitioner do not amount to even an allegation of such activity here. Petitioner's claims must thus succeed or fail in relation to their effect on "the justice of the finding of guilt." *United States* v. *Agurs*, *supra*, 427 U.S. at 112. The district court, after a thorough inquiry, found that none of petitioner's claims "placed [the] verdict under any cloud" (Pet. App. 47a). Petitioner is not entitled to a standard of review that ignores his inability to show that the jury's verdict of guilty would have been in any way affected. *Smith* v. *Phillips*, *supra*, 455 U.S. at 219-220; *United States* v. *Agurs*, *supra*, 427 U.S. at 111-113.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

FRANCIS J. MARTIN
Attorney

SEPTEMBER 1983

DOJ-1983-09

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of February, One Thousand Nine Hurdred and Eighty-three.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. THOMAS J. MESKILL,
Circuit Judges.

..... x

ALGER HISS,

Plaintiff-Appellant,

v. *ORDER*
82-6196

UNITED STATES OF AMERICA,

Defendant-Appellee.

..... x

Alger Hiss appeals from a judgment of the United States District for the Southern District of New York (Richard Owen, J.) dismissing his petition for a writ of error *coram nobis* for relief from a conviction of perjury, alleging several claims of prosecutorial misconduct. 28 U.S.C. § 1651(a) (1976).

We find the appeal to be completely without merit and affirm the judgment below substantially for the reasons stated in the thorough opinion of Judge Owen reported at 542 F. Supp. 973 (S.D.N.Y. 1982).

Hon. William H. Timbers

Hon. Ellsworth A. Van Graafeiland

Hon. Thomas J. Meskill

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No. 82-2072

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

In Re

ALGER HISS,

Petitioner.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

VICTOR RABINOWITZ, Esq.
30 East 42nd Street
New York, New York 10017
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Attorney for Petitioner

September 30, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2072

In Re

ALGER HISS,

Petitioner.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The brief of the United States in opposition to the petition for a writ of *certioari* is tendentious in the extreme, both with respect to its statement of facts and its discussion of the law. We suggest that such an approach in connection with a petition for *certiorari* is not helpful, but we do not have either the space or the time to isolate the many instances in the government's brief in which its case is overstated. We shall confine ourselves instead to a brief reply to the principal points made in the brief in opposition.

1. The government persists in misunderstanding petitioner's principal point relating to the typewriter, Ex. UUU, although we had thought we had made this clear in our petition for a writ of *certiorari,* as well as in our briefs in the district court and the Court of Appeals. The offense of the government resulting in a violation of petitioner's right to a fair trial consisted not merely, or even principally in its concealment of the doubts it had concerning the authenticity of the Woodstock typewriter. The government argued below that the typewriter was irrelevant, and the district court so found. (542 F. Supp.

996) Had the prosecution refrained from mention of the typewriter, its protestations might be given some weight. But it did not remain silent as to Exhibit UUU. It adopted the typewriter as its own and relied heavily on its authenticity without disclosing either to the court or the petitioner the substantial evidence in the files to the contrary. Thus, we have repeatedly called attention to Murphy's heavy emphasis on the typewriter in his closing. See Petition for Certiorari, pp. 11-16, and particularly fn. 15 at p. 12. Not only did Murphy assume the authenticity of the typewriter, despite the doubts the government had, but the trial court, in charging the jury, similarly placed heavy emphasis on the typewriter and assumed its authenticity. See Petition, p. 12.[1] No reference to petitioner's argument in this respect is made by the government in its brief in opposition.

Admittedly, this is an unusual case. It is not common that a defendant in a criminal action offers an exhibit which the prosecution knows to be of doubtful authenticity, but which it enthusiastically endorses because it turns out to be fatal to the defense. Had the government offered the typewriter in evidence while concealing its doubts, no one would deny that it was acting in bad faith and that petitioner's constitutional rights were being violated. The fact that the petitioner offered the exhibit in ignorance of the material in the FBI files cannot operate to deny petitioner his right to a fair trial. It must be kept in mind that the typewriter was central to the prosecution's case *as it was presented to the jury.* The government's post-trial efforts to minimize the exhibit cannot change what happened at the trial, and what was said to the jury by Murphy and the court.

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1 Of course, we cannot assign as error the trial court's charge to the jury. It did not know any more than did petitioner, that the government's files cast grave doubts on the authenticity of Ex. UUU. The court assumed its authenticity as did petitioner. Only the government had reason to question it.

We believe the evidence presented in this proceeding does more than cast doubt on the authenticity of the typewriter; it compels a finding that the typewriter offered at the trial was not the Hiss typewriter at all. But even if the government is correct and even if the prosecution merely had doubts as to its authenticity (and the record clearly shows such doubts), the result is the same. The prosecution cannot hide behind the fact that the typewriter was discovered and introduced into evidence by Hiss. Its duty certainly arises above such mechanical and legalistic reasoning.[2]

2. In discussing petitioner's contention that the FBI and the prosecution made repeated incursions into the defense camp and, indeed, sought information from defendant's investigators, the government refers only to the activities of Schmahl and states that Schmahl's contacts with the FBI occurred only during the first trial.

Even if this were an accurate statement of the record, it would not excuse the government in its continuing confidential communications with Schmahl, but it is not accurate. In the first place, Schmahl was interviewed by Murphy on June 5 and 6, 1949 (2 days before the verdict in the first trial) and provided information for him which he used in cross-examination of Hiss and Mrs. Hiss at the second trial, and which he used in his closing argument in the second trial (see Petition for Certiorari, pp. 17-18). Further, Schmahl again provided information to the FBI concerning interviews between himself and Hiss after the second trial and while the motion for a new trial was in preparation (see Petition for Certiorari, p. 18).

The government in its response to the Petition for Certiorari ignores still other contacts between Hiss' experts and the FBI. Raymond Schindler and Robert C. Goldblatt were both inter-

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2 As we have noted elsewhere, Hiss' production of the typewriter is inexplicable except on the assumption that he thought it would prove him not guilty. That assumption was mistaken—if the typewriter was authentic.

viewed by the FBI and supplied information relevant to the preparation for a new trial. The FBI invited Schindler to return with further information and actually solicited information from Goldblatt.

The full extent of these communications were not disclosed by the information turned over as a result of the FOIA proceedings, nor can we know whether there were not many other instances of the same character. In the absence of further disclosure, petitioner cannot detail the full effect the FBI's activity had on the second trial and on the motion for a new trial. This is one of the reasons petitioner seeks an evidentiary hearing. In the very nature of things, the extent to which the government utilized the information supplied by Schmahl, Schindler and Goldblatt, and perhaps others, cannot be ascertained without an opportunity for a hearing unless this Court is prepared to apply a *per se* rule in this case. It makes little sense to require petitioner to prove prejudice while denying to him the means of meeting that requirement. See cases cited at p. 27 of the Petition for Certiorari.

3. Petitioner further argues that pre-trial statements made by Chambers were improperly withheld. The government states categorically that counsel for Hiss did not demand production of two of the statements and that concealment of the third statement was non-prejudicial (Brief in Opposition, p. 17). The facts with respect to the petitioner's demands were summarized in the Petition for Certiorari at pp. 21-23. This explanation is completely ignored by the government in its brief.

The government further contends that, in any event, the material contained in the withheld statements would not have been helpful to the petitioner, either because they were cumulative of other statements that were produced, or because the information provided by those statements was not admissible. But it is not for the prosecution to determine whether the material which a defendant requests is or is not material to the defense. Nor is the judgment of an appellate court decisive. A defendant is entitled to a trial by jury, not by an appellant

court. The judgment of what evidence a defendant deems relevant can be made only by defendant's counsel; its admissibility can be best determined by the trial court which is familiar with the evidence offered and can best evaluate, in the context of a trial, the significance of the statements withheld and their admissibility in evidence. To argue many years after the trial that the evidence would not have been of help to the defense, results in the denial to the defendant of his fair trial rights.

This is particularly true of Ex. CN 23 relating to Chambers' homosexual activities. Murphy's questioning of the psychiatric witnesses would not have been possible had the defense been aware of the existence of Ex. CN 23. That cross-examination was not trivial, but addresses itself to essential parts of the psychiatric testimony which occupied a major portion of the trial record and which was discussed by Murphy near the opening of his summation.[3]

4. Petitioner's contention that he is entitled to an evidentiary hearing is not limited to the question of electronic surveillance, but encompasses other areas in dispute as well, such as the significance of the government's intrusion into the defense camp, aspects of the authenticity of the typewriter which are still unrevealed, and related matters.

It is true that petitioner has no evidence of unlawful wiretapping; had such evidence been available it would have been presented. Petitioner has, however, more than a "bare hope" that he will discover such evidence through an evidentiary hearing. As is pointed out in the Petition for Certiorari, p. 28, a wiretap was placed on the Hiss telephone in Washington in 1945 and continued every day thereafter until September, 1947, when Hiss and his family moved to New York City. The documents produced thus far by the New York field office are silent as to whether this surveillance continued in New York, but it is unreasonable to assume that it was discontinued at a

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3 The district court found that cross-examination of one of the psychiatrists was improper (Petition for Certiorari, p. 27).

time when Hiss' alleged involvement in espionage was the subject of attention by the House Committee on Un-American Activities and finally by the grand jury. That some of records of the surveillance might have been destroyed is not surprising; at the very time Hiss was indicted, the FBI was destroying its files in the *Coplon* case. See Petition for Certiorari, p. 28. It is still possible that there are records either in New York or Washington which will indicate whether there was surveillance, however extensive it was, and the substance of the material acquired thereby, even though the actual logs and details of that surveillance may not be available.

As is noted above at p. 5, the subjects of FBI intrusion into Hiss' preparation for trial and for the new trial are also appropriate subjects for an evidentiary hearing. The facts in the record are highly suspicious and petitioner has never had an opportunity to follow through on the possibility of government misconduct in this area. Evidentiary hearings in connection with an application for a writ of *coram nobis* are by no means unusual. See p. 27 of the Petition of Certiorari.

CONCLUSION

For the above stated reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

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Dated: New York, New York
September 30, 1983